87-2066

No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION,
INTERNATIONAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Act of State Doctrine bar adjudication of an action which would require judicial determination of whether the Government of Nigeria acted illegally in performing an act of state and which would *prima facie* have an impact on foreign relations?

2. Does a complaint properly allege facts establishing a pattern of racketeering activity under the Racketeering Influenced and Corrupt Organizations Act when that complaint alleges only that defendants had engaged in one non-continuous, completed scheme to influence improperly the award of a single contract?

PARTIES TO THE PROCEEDINGS BELOW

Environmental Tectonics Corporation, International was the plaintiff below. W.S. Kirkpatrick & Co., Inc., D.I.C. (Holding) Inc., Harry G. Carpenter, John M. Krankel, W.S. Kirkpatrick & Co., International, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards were named and served as defendants below. International Development Corporation, S.A. and Benson "Tunde" Akindele were named as defendants below but never served. Development Industrial Corporation was named and served as a defendant in the complaint but was dropped from an amended complaint that was filed subsequently.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, petitioners state that D.I.C. (Holding) Inc. is the parent of W.S. Kirkpatrick & Co., Inc.; W.S. Kirkpatrick & Co., International is a subsidiary of W.S. Kirkpatrick & Co., Inc.; and International Development Corporation, S.A. is the parent of D.I.C. (Holding) Inc. W.S. Kirkpatrick & Co., Inc. has the following affiliates: Development Industrial Corporation, TIA Electric Co., Inc., Aeronautical Equipment Corp., R. Bruce Fike & Sons Dairy, Inc., Bulk Investments Corp., Daisy Lane Dairy, Deep Creek Creamery, Inc., and Interhotels of America, Inc.

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No.

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— VS. —

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATION TO OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an opinion in this case on May 2, 1988. The opinion, which has not yet been reported, has been reprinted at pages A. 1 through A. 37 of the Appendix attached hereto.

The United States District Court for the District of New Jersey issued an opinion in this case on May 1, 1987. The opinion is reported at 659 F. Supp. 1381 (D. N.J. 1987) and has been reprinted at pages A. 38 through A. 75 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 2, 1988 reversing and remanding the dismissal of the action on grounds of the Act of State Doctrine and the dismissal of the claims under the Racketeering Influenced and Corrupt Organizations Act and the New Jersey Anti-Racketeering Act. A copy of this Judgment has been reprinted at pages A. 76 through A. 78 of the Appendix. The decision dismissing the action and these claims was entered by the United States District Court, District of New Jersey on May 1, 1987. On May 26, 1988, the Third Circuit stayed the issuance of a formal mandate until June 22, 1988, which stay will continue until final disposition by this Court if the Third Circuit receives notice by June 22, 1988 that a petition for a writ of certiorari has been filed. A copy of this Order has been reprinted at page A. 79 of the Appendix. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND DOCTRINES INVOLVED

The Act of State Doctrine, created by this Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), which states:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The Robinson-Patman Act, 15 U.S.C. § 13(c), which states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary

> is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(a), which states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The New Jersey Anti-Racketeering Act, N.J.S. 2C:41-2, which states:

> It shall be unlawful for any person who have received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce.

STATEMENT OF THE CASE

Factual Background

In 1981, a New Jersey corporation, W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), through a subsidiary, W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), entered into a

contract with the Government of Nigeria. The contract provided for Kirkpatrick International to develop an aeromedical center at the Kaduna Air Force Base in Kaduna, Nigeria. The contract was awarded to Kirkpatrick International by the Ministry of Defense of the Nigerian government.

In approximately 1984, the United States Department of Justice commenced a grand jury investigation into the circumstances surrounding the award of the 1981 contract. Kirkpatrick, which was then under new management, fully cooperated with the government in its investigation. In the course of the investigation, Kirkpatrick uncovered evidence which showed that an agent hired by Kirkpatrick, Benson "Tunde" Akindele, had represented to Kirkpatrick that officials and representatives of the Government of Nigeria had demanded that Kirkpatrick pay bribes to them in order to be awarded the contract. The evidence showed that, faced with these demands, Kirkpatrick's former management had apparently agreed to make payments to that agent with the understanding that he would cause bribes to be paid to officials or representatives of the Nigerian Government. Although this evidence did not establish that a bribe actually was paid to anyone, the mere offer of payment or agreement to pay alone violates the Foreign Corrupt Practices Act, 15 U.S.C. § 78 dd-2. Accordingly, Kirkpatrick pled guilty to one count of violating the act and was sentenced to a fine of $75,000.

The Civil Action

Following the conclusion of the criminal action, ETC filed a complaint in United States District Court for the District of New Jersey. The jurisdiction of the Court was invoked pursuant to 18 U.S.C. §1964, 15 U.S.C. §15 and principles of pendent jurisdiction. The complaint alleged that ETC was the competing bidder for the Kaduna contract and that ETC would have been awarded the contract but for defendants' payment of bribes. The complaint also alleged that in order to obtain that one contract the defendants had agreed to pay and had paid a single bribe in a series of installments through one intermediary, Akindele, for distribution to certain unnamed Nigerian officials. ETC

claimed violations of the Robinson-Patman Act, 15 U.S.C. § 13(c), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically 18 U.S.C. §§ 1962(b), (c) and (d), and the New Jersey Anti-Racketeering Act, N.J.S. 2c:41-2. A total of eleven defendants were named in the complaint, including Kirkpatrick and Kirkpatrick International.

Kirkpatrick and several other defendants moved to dismiss the complaint, alleging *inter alia* that the action was precluded by the Act of State Doctrine. Kirkpatrick argued that adjudication of this action would *prima facie* impact upon relations between this country and the Government of Nigeria in a manner and to an extent that would be far more offensive and embarrassing to the Government of Nigeria than was adjudication of the criminal action.

First, this action would mandate adjudication of whether Nigerian government officials actually were paid bribes by Kirkpatrick's agent, Akindele. The criminal action did not reach or resolve that issue because, under the Foreign Corrupt Practices Act, the mere payment of money to Akindele with the understanding that he would pay bribes constituted a violation. Second, this action would necessarily involve proof as to the identity of the individual officials and representatives who allegedly accepted bribes and of all the specifics of the alleged bribe giving and taking. In the criminal prosecution, such specific information was superfluous since there was no need to prove that a bribe was actually ever paid. Third, unlike the criminal action, this action would adjudicate whether demanding and receiving bribes is customary for the Government of Nigeria. This issue cannot be avoided since, in order for ETC to prove causation, ETC would have to prove that it would have been awarded the contract without paying a bribe. A primary defense of the defendants would be that bribes are always extorted by Nigerian government officials and that in order to do business with the Nigerian government, bribes must be paid to its officials and representatives. Thus, defendants would necessarily attempt to prove that ETC would have been forced to pay a similar bribe in order to be awarded the contract and that, therefore, ETC has no standing to complain as to the payment of one by Kirkpatrick.

In considering the Act of State issue, the District Court invited the Department of State to offer input on whether it objected to adjudication on foreign relations grounds. The State Department responded by letter that adjudication could prove detrimental to foreign relations with Nigeria. However, the letter also stated, in contradictory fashion, that the State Department did not believe that adjudication was barred by the Act of State Doctrine. The District Court determined that this letter provided no guidance about whether the action could be adjudicated.

Also, while awaiting a response from the State Department to the Court's invitation to offer input, ETC privately wrote to the Nigerian government seeking a statement that the government has no objection to adjudication of this action. The government did not respond to ETC's request.

The District Court decided that the action was barred by the Act of State Doctrine and must be dismissed. The Court also held that the complaint failed to plead a pattern of racketeering activity under RICO.

REASONS FOR GRANTING THE WRIT

1. *The Third Circuit's Decision Creates a Direct and Irreconcilable Conflict Among Several Circuits Regarding the Proper Application of the Act of State Doctrine*

A. *The Conflict*

The decision of the Third Circuit in this case squarely and irreconcilably conflicts with a decision reached by the Ninth Circuit on substantially indistinguishable facts. *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983). The conflict, which regards the proper application of the Act of State Doctrine, impacts upon this country's conduct of foreign relations as well as the fundamental constitutional principle of separation of powers. Since this case presents a direct conflict between circuits involving important constitutional issues,

certiorari should be granted. *See Aldinger v. Howard*, 427 U.S. 1, 3 (1976); Rules of the Supreme Court of the United States, Rule 17.1(a).

In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco, the plaintiff, alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental, the defendant, the contract after Occidental paid the minister and his son more than $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06.

The district court dismissed Clayco's lawsuit on Act of State grounds and the Ninth Circuit affirmed the dismissal. The Ninth Circuit held that since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco is on all fours with this case. Here, as in *Clayco*, the plaintiff and the defendants were in competition for a contract with a foreign government. The plaintiff alleged that it would have been awarded the contract but for the defendants' payment of bribes to foreign officials and representatives. The defendants' conduct came under scrutiny by officials in this country, resulting in confirmation that the defendants had violated the laws of this country. The plaintiff then sued on grounds that its rights had been violated.

The similarity between this case and *Clayco* is underscored by the failure of ETC and the Third Circuit even to attempt to

distinguish *Clayco*. Rather, ETC argued, and the Third Circuit found, that the Ninth Circuit's holding in *Clayco* was simply wrong. *See* Transcript of Argument on November 20, 1987, at 7; *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546 at 17 (3rd Cir. May 2, 1988) ("Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court. . .").

This conflict regarding the proper application of the Act of State Doctrine extends to the Second Circuit as well since that circuit favors the view of the Act of State Doctrine that is reflected in *Clayco*. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). In *Hunt*, the Second Circuit held that the Act of State Doctrine rendered nonjusticiable a claim that required inquiry into the motives of a foreign government in performing certain acts. Citing *Hunt*, the Third Circuit here suggested that the Second Circuit's interpretation of the Act of State Doctrine is excessively strict. *Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.* Nos. 87-5328 and 87-5546 at 17 n.9.

Similarly, in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987), *petition for cert. filed*, (U.S. Feb. 8, 1988) (No. 87-1350), the Second Circuit again held that adjudication was precluded by the Act of State Doctrine when an action required inquiry into the motives of a foreign government in performing certain acts.[1]

---

[1] The plaintiff in *O.N.E.* recently filed a Petition for a Writ of Certiorari, which is pending before this Court. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *petition for cert. filed*, (U.S. Feb. 8, 1988) (No. 87-1350). The existence of this petition further demonstrates the importance of this issue and the need for resolution by this Court. However, *O.N.E.*, which involved several issues, including comity and foreign compulsion considerations, does not present as straightforward an Act of State issue as is presented here. Thus, this action provides a better vehicle for this Court to delineate the parameters of the doctrine.

B. *The Importance Of The Issue*

This Court recognized years ago in *Banco Nacional de Cuba v. Sabbatino* that the Act of State Doctrine bears importantly "on the conduct of this country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964). Indeed, the importance of these issues was the reason why this Court granted *certiorari* in that case. *Id.* More than two decades later, the proper construction and application of the Act of State Doctrine remains as critical as ever to both our conduct of foreign relations and the proper role of the judiciary. Thus, *certiorari* should be granted here to eliminate the conflict and confusion which has been generated by the recent decisions on this issue.

2. *The Third Circuit's Decision That The Act of State Doctrine Does Not Proscribe Adjudication Of This Action Is In Conflict With Applicable Decisions of This Court*

The classic statement of the Act of State Doctrine is set forth in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

As this Court stated in *Sabbatino*, the doctrine expresses the strong sense of the judiciary that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. *Sabbatino*, 376 U.S. at 423.

The Third Circuit's decision is in direct conflict with the doctrine as outlined by this Court in *Underhill* and *Sabbatino*. According to the decision, the Act of State Doctrine does not bar

adjudication of this action for two basic reasons: (i) adjudication would require at most an inquiry into the motivations behind, rather than the legality of, the foreign government's acts; and (ii) defendants failed to demonstrate that adjudication was bound to result in conflict between the executive and the judiciary. *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546 at 23. Thus, the Third Circuit apparently reasoned that judicial inquiry into the motivations behind a foreign government's acts is permissable under the doctrine and that defendants who invoke the doctrine must prove that conflict between the judiciary and the executive is an inevitable consequence of adjudication.

Contrary to the Third Circuit's decision, the holding and reasoning of *Sabbatino* make clear that inquiry by the courts of this country into whether foreign government officials were influenced by bribery in the award of a government contract is exactly the sort of inquiry that the Act of State Doctrine was designed to proscribe. *Sabbatino*, 376 U.S. at 401. If the doctrine, as created by this Court, has any meaning at all, it must mean that the courts of this country shall not sit in judgment on whether Nigerian government officials or representatives demanded in this case that bribes be paid to them, whether they awarded the contract on the basis of those bribes and whether they customarily demand bribes from anyone who wishes to do business with their country. Since bribery is almost universally recognized as a crime, adjudication of these questions by the courts of this country would necessarily be offensive to the government of Nigeria. Adjudication therefore would inevitably affect our relations with that government as well as relations between the executive and the judiciary.

3. *The Third Circuit's Finding That a Pattern Exists Under RICO Conflicts Directly with Sedima and with Decisions of Several Other Circuits*

This Court recently recognized the need for clarity in the determination of what is a RICO pattern by granting *certiorari* in

H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S. Ct. 1219 (1988). This case would make an excellent companion case to *H.J.* and consideration of it by this Court along with *H.J.*, which involved bribery allegations of a much more pervasive and variegated nature than present here, would help facilitate this Court's efforts to clarify an area of law that has been aptly characterized as "sheer bedlam." *See Furman v. Cirrito*, 828 F.2d 898, 909 (2d Cir. 1987) (Pratt, J., dissenting).

In *H.J.*, petitioners allege that from 1980 through the present, respondent Northwestern Bell attempted to, or did, bribe commissioners of the Minnesota Public Utilities Commission through a variety of methods. At least three distinct, dissimilar acts of bribery were described in the complaint, one involving payments made to commissioners through a middleman, one involving payments made to a former commissioner in "consulting fees", and one involving the payment by respondent for parties, gifts and meals for commissioners. *See* Petition for Writ of Certiorari, *H.J. Inc. v. Northwestern Bell Tel. Co.* (87-1252) (filed Jan. 20, 1988), at 5. The Eighth Circuit dismissed the complaint on grounds that only one scheme existed for purposes of RICO and therefore that the pattern requirement was not satisfied. *H.J., Inc.*, 829 F.2d at 650. On March 21 of this year, this Court agreed to review that decision.

The Eighth Circuit's decision reflects what has been characterized as the restrictive interpretation of RICO's pattern requirement. According to this interpretation, a RICO pattern exists only when a complaint alleges multiple separate criminal schemes or episodes. *E.g. Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The approach is the opposite of the liberal view, which holds that two related acts may constitute a pattern when committed in furtherance of a single scheme. *E.g. United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986). Between these views lies the moderate approach, which involves the analysis of a number of factors to determine whether a pattern has been alleged. *See Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1286 (D. Virgin Islands 1987).

In this case, the Third Circuit expanded the liberal approach in finding that a RICO pattern had been pleaded and therefore stands at the opposite end of the spectrum from *H.J.*. Here, the Third Circuit found that even though only one series of payments to effectuate a single bribe was alleged, the pattern requirement was nonetheless satisfied. *See Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546, at 25-26. Thus, there was *less* reason here to find a pattern than in *H.J.*, yet in this case a pattern was found to have been properly pleaded.

An affirmance by the Court of the decision in *H.J.* would necessarily determine whether a RICO pattern has been alleged in this case. However, a reversal of the decision in *H.J.* would not necessarily resolve that issue in this action or determine whether the "moderate" or "liberal" approach to determining what is necessary for a RICO pattern is appropriate or whether some variation ought to be applied. Thus, given the facts and decisions in this case and *H.J.*, this case would be an excellent companion case to be decided along with *H.J.* because, with two cases at opposite ends of the spectrum, the RICO pattern issue could be fully considered and resolved.

In any event, if this Court determines that its ruling in *H.J.* will fully resolve what is necessary to establish a RICO pattern, this Court should defer ruling on this petition for *certiorari* insofar as it relates to the pattern issue until after it decides *H.J.* *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (petition held by this Court until decisions were rendered in other cases raising similar issues).

CONCLUSION

It should be resolved whether the Act of State Doctrine bars adjudication of actions which require judicial determination whether a foreign government acted illegally in performing an act of state and which would *prima facie* have an impact on foreign relations. It also should be resolved whether a complaint properly alleges facts establishing a pattern of racketeering activity when that complaint alleges only that defendants had engaged in one non-continuous, completed scheme to influence improperly the award of a single contract. For these reasons, and all other reasons herein, *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.,
IDC INTERNATIONAL
S.A. LUXEMBOURG,
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING
CO., INC., ROSS E. SAXON c/o NAUTILUS
ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.,

Appellants in No. 87-5546

On Appeal from the United States District
Court for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Argued November 20, 1987

BEFORE: GREENBERG and SCIRICA, *Circuit Judges*
and POLLAK, *District Judge**

(Filed May 2, 1988)

THOMAS H. SEAR, ESQ. (Argued)
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Environmental Tectonics
International, Inc.

---

* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

THEODORE V. WELLS, JR., ESQ.
ROBERT L. KRAKOWER, ESQ. (Argued)
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Harry G. Carpenter

OPINION OF THE COURT

POLLAK, District Judge:

Appellant Environmental Tectonics Corporation International ("ETC"), a Pennsylvania corporation, brought this action to recover damages against several defendants for, *inter alia*, violations of the federal Racketeering Influenced Corrupt Organizations Acts, 18 U.S.C. §§ 1962-1968, the New Jersey Anti-Racketeering Act, 2C N.J.C.S. § 41-1, and the Robinson-Patman Act, 15 U.S.C. 13(c). Essentially, ETC claims to have been injured by an apparently successful scheme, allegedly participated in by all of the defendants, to influence the award of a Nigerian defense contract through bribery of Nigerian government officials. The district court concluded that the act of state doctrine barred adjudication of ETC's claims, and dismissed the action in its entirety. In the alternative, the court also ruled on other substantive and procedural issues.

I.

This action arose from the award of a contract by the Federal Republic of Nigeria to defendants W. S.

Kirkpatrick & Co. ("Kirkpatrick") and W. S. Kirkpatrick & Co. International ("Kirkpatrick International"), both of which are New Jersey corporations. Kirkpatrick is in the business of selling and brokering aircraft equipment, parts and facilities to airlines and foreign air forces. Kirkpatrick International, its wholly-owned subsidiary, was formed to carry out Kirkpatrick's duties under the contract to be awarded by the Nigerian government. Also named as defendants were Kirkpatrick's parent corporations, DIC (Holding) Inc. ("DIC"), a Delaware Corporation, and International Development Corporation, S.A. ("IDC"), a Luxembourg corporation.

In 1980, when the events alleged in the amended complaint[1] began, defendant Harry Carpenter was chairman of Kirkpatrick's board of directors and the company's chief executive officer. In 1980, Carpenter learned that the Nigerian government was interested in purchasing aeromedical equipment, and in constructing and equipping an aeromedical center for the Nigerian Air Force at Kaduna Air Force Base (the "Air Force contract"). Kirkpatrick contracted with defendants Emro Engineering Co., Inc. ("EMRO") and Nautilus Environmedical Systems, Inc. ("Nautilus") to provide engineering, design and related assistance needed to build the proposed facility and to supply the equipment.

Carpenter hired a Nigerian national, defendant Benson ("Tunde") Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the Air Force contract. In or around March of 1981, Carpenter and Nautilus president Ross Saxon[2] met with Akindele to

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1. The following factual recital is based primarily on the amended complaint.

2. Saxon and Robert Ruppert, Emro's president, were also named as defendants. Two other Kirkpatrick officers, Robert H. Edwards and John M. Krankel, were named as well.

discuss their bid strategy. According to a contemporaneous memorandum written by Carpenter, Akindele told Carpenter and Saxon that to secure the bid Kirkpatrick should be prepared to pay a sales commission totalling twenty percent (20%) of the contract price. Most of this commission was to be paid to Nigerian political and military officials.[3] Akindele explained that Nigerian officials generally expected such payments from contract bidders, and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.

Through a written agreement with Akindele, Kirkpatrick agreed to pay the commissions to two Panamanian corporations. In May of 1981, these corporations -- which were controlled by Akindele -- were established to receive the commissions and to distribute them to Nigerian officials. On March 19, 1982, the Nigerian Defense Ministry entered into an agreement awarding the Air Force contract to Kirkpatrick International. In September of 1982, the Nigerian government made the first of four contract payments to Kirkpatrick. The remaining payments were made in December of 1982, in February of 1983, and in August of 1983. After each of the four contract payments, the defendants via the United States mails and wire transfers paid a portion of the promised commissions to Akindele's Panamanian corporations, whence the monies were distributed to Nigerian officials. In the end, Kirkpatrick's commission payments to the Panamanian corporations, and thus,

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3. ETC alleged in its complaint that the 20% commission was to be distributed as follows: 2 1/2% for Akindele, 5% for the Nigerian Air Force, 2 1/2% for the medical group, 5% for a political party, 2 1/2% for the relevant cabinet minister, and 2 1/2% for other key defense personnel.

to Akindele and various Nigerian officials, totalled over $1.7 million.

In the latter half of 1981 and 1982, while Kirkpatrick was implementing the bid strategy described above, ETC, which is also in the business of selling aeromedical equipment to foreign governments, was preparing its own bid for the Air Force project. ETC submitted its pricing information to the Nigerian government in February of 1981, and it continued in contact with Nigerian military and diplomatic officials throughout the course of that year. ETC's president met with Nigerian officials in Nigeria, and submitted a formal bid for the Air Force contract in December of 1981. ETC submitted its final formal bid in February of 1982, a month before the Nigerian government awarded the contract to Kirkpatrick.

ETC states that it decided to investigate the Nigerian government's award of the Kaduna contract to Kirkpatrick in April of 1983, after learning that its bid had been far lower than Kirkpatrick's. ETC reported its findings to the Nigerian Air Force[4] and to the United States Embassy in Lagos, Nigeria. After an investigation by the United States Justice Department, Carpenter and Kirkpatrick each were charged with violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (hereinafter "FCPA").

As part of its plea negotiations on the United States charges, Kirkpatrick and Carpenter both agreed to offers of proof which outlined the Air Force contract scheme in its entirety, including Carpenter's hiring of Akindele, and Akindele's control of the Panamanian corporations. Both offers of proof also stated that Akindele and Carpenter agreed that the money paid to

4. Both bribery and the acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No.38 (November 22, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

the Panamanian corporations as commissions would be distributed to Nigerian political and military officials. Carpenter and Kirkpatrick both pled guilty to one FCPA violation, and were eventually sentenced: Carpenter to two hundred hours of community service and a fine of $10,000, and Kirkpatrick to a fine of $75,000, payable over a five-year period.[5]

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5. At Kirkpatrick's sentencing on January 6, 1986, Assistant United States Attorney Steven Levy, who was in charge of Carpenter's and Kirkpatrick's prosecutions, made the following representation to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated [sic]. ...I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals [,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names.....

Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22.

ETC filed this action shortly after Kirkpatrick's sentencing. Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which contended, *inter alia*, that the plaintiff had failed to allege a "pattern of racketeering activity" as required by the federal and state RICO statutes. ETC filed an amended complaint that responded to some of the issues raised by the defendants' motion to dismiss, and that added common law counts to ETC's antitrust, RICO, and anti-racketeering counts. ETC also filed an answer to the remainder of the defendants' motion to dismiss.

In their reply to ETC's answer to their motion, defendants moved for dismissal of the action in its entirety on act of state grounds. The district court requested further submissions from the parties in the form of answers to specific questions. The court also requested a *Bernstein* letter, i.e., an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by this case.[6] Legal Adviser Abraham Sofaer responded to

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6. The term "*Bernstein* letter" is derived from the Second Circuit's opinion in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). Plaintiff Bernstein, a German national, owned a corporation that was confiscated by the Nazi government during World War II. The corporation's main asset was a ship; Bernstein was forced to relinquish title to the ship, as well as all other interest in the corporation. The Second Circuit initially dismissed Bernstein's suit against the ship's subsequent owners on act of state grounds. *See Bernstein v. Van Heygen Freres Societe Anonyme*, 163 F.2d 246 (2nd Cir. 1947). The court reversed itself after receiving a letter from the State Department's Legal Adviser, which stated that it was United States policy to permit the courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials.

The Supreme Court subsequently determined that, while it was proper for a federal court to consider a *Bernstein* letter,

the court's request in a letter dated December 10, 1986, which is appended to this opinion. Treating defendants' motion to dismiss as a motion for summary judgment, the district court dismissed the action on act of state grounds. *See Environmental Tectonics Corp., International v. W.S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381, 139198 (D.N.J. 1987).

Although the dismissal on act of state grounds embraced ETC's entire claim against all the defendants, the district court went on to rule, in the alternative, on other issues: The court rejected defendants' contention that ETC lacked standing to assert antitrust and RICO claims. The court did, however, dismiss the RICO count for failure to allege a pattern of racketeering activity. For the same reason, the court dismissed the New Jersey Anti-Racketeering count. In addition, the court upheld a magistrate's determination that Carpenter was entitled to decline to answer, on Fifth Amendment grounds, certain questions put to him on deposition. Finally, the court held that ETC's amended complaint adequately stated a case for holding IDC and DIC legally responsible for Kirkpatrick's scheme to obtain the Air Force contract.

ETC appeals from the act of state, RICO, and Fifth Amendment rulings. The defendants, in addition to urging the correctness of these rulings, have cross-appealed from those alternative rulings that were

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the Legal Adviser's recommendation in any given case was not to be considered binding on the court. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), Justice Rehnquist, announcing the judgment of the court, argued that the federal courts should defer to the view of the State Department; but only two other members of the court, Chief Justice Burger and Justice White, joined in his opinion. Justices Douglas and Powell, each of whom concurred separately, rejected the view that the State Department's view should control. So, too, did Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun in dissent.

adverse to them. Since the district court's grant of summary judgment on act of state grounds, if affirmed here, would obviate consideration of all other issues, we turn first to the act of state question.

II.

On review of a district court's grant of summary judgment, we utilize the same standard that the district court was required to apply. *See Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3rd Cir. 1987). There is no real disagreement on the facts relevant to the district court's act of state determination. On this appeal, therefore, we are called upon to decide whether the appellees were entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

ETC's challenge to the district court's grant of summary judgment raises important issues about the proper application of the act of state doctrine. The doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of this country will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders. *See Restatement (Revised) of Foreign Relations Law of the United States* § 469[428] (1986). The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 694 (1976); *Williams v. Curtiss-Wright*, 694 F.2d 300, 303 n.4 (3rd Cir. 1982).

Although earlier formulations of the doctrine were grounded in notions of comity among sister states,[7]

7. *See Underhill v. Fernandez*, 168 U.S. 250, 252 (1898); *Restatement (Revised) of U.S. Foreign Relations Law* § 469 [428] comment a.

the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government -- especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* at 423. Thus, courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. *See First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972) (hereinafter "*Citibank*").

Sensitively applied, the doctrine can prevent judicial entanglement in international conflicts that are more appropriately resolved through political channels. Individual litigants and the enforcement of national policies pay a price, however, for this institutional self-discipline -- its application in effect means that "on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy." *Citibank*, 406 U.S. at 769 (opinion of Rehnquist, J.). For this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case. *See id.* at 775-76 (Powell, J. concurring); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3rd Cir. 1979) (courts should

analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role).

The main issue raised by ETC's appeal involves the proper application of the doctrine when a litigant invokes the doctrine as a defense to a suit for damage or injury stemming from a course of events that included some acts by officials of a foreign government. *Sabbatino* and the Supreme Court's other modern act of state cases have focused on state expropriations of private property, the clearest example of a political act that, to paraphrase Justice Harlan, touches on the nerves of the international community. *See Sabbatino*, 376 U.S. at 428. This has, however, left a broad range of governmental conduct -- *e.g.*, court decisions; the granting of a license, patent, or some other state monopoly; or, as in this case, the award of a construction or procurement contract -- for lower courts to consider.

The appellant has advanced several objections to the district court's act of state determination. Two of these objections lack merit. First, we agree with the district court's conclusion that the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine. It is true that certain governmentally authorized acts, such as the award of a patent or the acts of a bankruptcy trustee, are considered so routine as to be not of substantial concern to the political branches in their conduct of foreign policy. *See Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3rd Cir. 1987); *Mannington Mills*, 595 F.2d at 1294. But the award of a major defense contract generally does not result from a near-mechanical exercise of narrowly-defined governmental discretion. The award of a military

contract, particularly one for a major project, is usually influenced by national security considerations -- considerations that are far from routine.

We also agree with the district court that the so-called "commercial" exception to the act of state doctrine -- an exception endorsed by a plurality of the Supreme Court but neither acquiesced in nor rejected by a majority, *see Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) -- has no application to this case.[8] Under the commercial exception's terms, a court would not abstain from deciding a case involving the purely commercial act of a sovereign or one of its instrumentalities. *See Dunhill*, 425 U.S. at 695 (plurality opinion of White, J.). To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit. *Cf. Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2nd Cir. 1984)(applying the Foreign Sovereign Immunity Act's definition of "commercial"), *cert. denied* 471 U.S. 1125 (1985); *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2nd Cir. 1981)(same), *cert. denied* 454 U.S. 1148 (1982). While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental. *See Curtiss-Wright*, 694 F.2d at 302.

We part company with the district court, however, on the remainder of its act of state analysis. The district court employed a formulation of the doctrine that barred the adjudication of ETC's claims "if the inquiry presented for judicial determination includes

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8. In *Curtiss-Wright*, 694 F.2d at 302 n.2, this court noted that the commercial exception has not been endorsed by a majority of the Supreme Court. We have no occasion here for going beyond what was said in *Curtiss-Wright*.

the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of the foreign policy of the United States." *ETC*, 659 F. Supp. at 1392-93. The court found that adjudication of ETC's claims would lead inevitably to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick. Because the district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government, it concluded that this case presents the type of situation which precludes judicial inquiry. *See id.* at 1393.

In reaching its conclusion, the district court relied primarily on the interpretation of the act of state doctrine advanced in a Ninth Circuit case, *Clayco Petroleum v. Occidental Petroleum*, 712 F.2d 404 (9th Cir.), *cert. denied* 464 U.S. 1040 (1984). In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental the contract after Occidental paid the minister and his son over $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06. The district court dismissed *Clayco*'s lawsuit on act of state grounds.

In a *per curiam* opinion, the Ninth Circuit affirmed the dismissal, concluding that the act of state

doctrine barred adjudication of Clayco's claims. Although calling for a "flexible" approach to the doctrine's application, the court expressed its unwillingness to permit judicial inquiry into the motivation behind Um Al Quywayn's award of the concession. Since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the court concluded that the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine "is not lightly to be imposed...."[9] *Mannington Mills*, 595 F.2d at 1293. In *Mannington Mills*, the plaintiff claimed that defendant Congoleum violated the antitrust laws by using patents it allegedly procured by fraud to restrict the plaintiff's trade abroad. In bringing its suit, plaintiff did not ask the court to declare the foreign patents invalid. Instead, Mannington argued that its

9. One commentator has noted that *Clayco* has adopted the "strict" view of the act of state doctrine favored by other courts, most notably the Second Circuit in *Hunt v. Mobil Oil*, 550 F.2d 68 (2nd Cir.), *cert. denied* 434 U.S. 984 (1977), that precludes examination of a foreign sovereign's motivations. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 357 n.190 (1986). Courts and commentators alike have criticized this interpretation of the doctrine as discouraging effective enforcement of United States regulatory policies against those who violate the law by engaging in illegal or anticompetitive conduct abroad. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied* 445 U.S. 903 (1980); *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981); Bazyler, *supra*, at 347. This court has expressed similar concerns with too sweeping an application of the doctrine. *See Curtiss-Wright*, 694 F.2d at 304 & n.5

action was concerned only with proving Congoleum's violations of United States trade regulations. *See Mannington Mills*, 595 F.2d at 1290-91.

In *Mannington Mills* this court held, through Judge Weis, that the act of state doctrine did not bar adjudication of the plaintiff's claims. The court focused on the nature of the questioned conduct -- the grant of a patent, an essentially routine act that raised no serious foreign policy concerns. *See id.* at 1294. But implicit in the opinion was an unwillingness to allow litigants to shield themselves from the consequences of illegal conduct abroad by invoking the act of state doctrine as a defense in American courts. *See id.* at 1293.

What was implicit in *Mannington Mills* became explicit in *Williams v. Curtiss-Wright*. Plaintiff Williams alleged that defendant Curtiss-Wright monopolized the international market for a certain kind of jet engine, and claimed violations of the federal antitrust laws, as well as injury caused by common-law torts. Curtiss-Wright moved to dismiss Williams' complaint on act of state grounds, arguing that the doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied Curtiss-Wright's motion. *See Curtiss-Wright*, 694 F.2d at 301-02.

On appeal, this court, again speaking through Judge Weis, affirmed. This court rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government. Judge Weis noted that a private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government. *See id.* at 304 (citing *Continental Ore v. Union Carbide & Carbon Corp.*,

370 U.S. 690 (1962)). The opinion stressed the importance of insuring that the act of state doctrine not interfere with the implementation of the policies served by antitrust and other regulatory statutes. "The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations.... " *See id.* at 304 (citations omitted). Having found that the record did not show that litigation of Williams' claims would impede the executive's conduct of foreign relations, this court held that application of the doctrine was not called for.

The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

In the instant case, the district court's dismissal was based on little more than speculation about the effect that ETC's lawsuit might have on relations between the United States and Nigeria. The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

Thus, to resolve ETC's claims on their merits, the district court would be called on simply to determine as

a factual matter whether the appellees' alleged bribery of Nigerian officials motivated the award of the contract. The only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy was the letter from Legal Adviser Sofaer.[10] That official pronouncement of State Department policy, as it relates to this litigation, reads as follows:

> In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:
>
> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions....
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination

10. Assistant United States Attorney Levy's representations at Kirkpatrick's sentencing, *supra* note 5, were not made in the course of these proceedings, were not addressed to act of state questions, and antedated the Legal Adviser's letter by nearly a year.

> that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.
>
> These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the court from adjudicating this dispute.

See Letter from Abraham D. Sofaer, Appendix to this Opinion (December 10, 1986) (emphasis in original).

In sum, the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of ETC's lawsuit.[11] We appreciate, of

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11. The Legal Adviser's letter does urge the court to exercise "caution and due regard for foreign sensibilities" at each stage of the litigation. In particular, the court is asked "to endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." Interpreting this passage as a failure on the part of the Legal Adviser to "sign off" completely on the act of state question, the district court dismissed

course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts.[12] But the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.[13] As against that assessment, defendants have not developed a factual record "showing that adjudication may hinder international relations ...." *Curtiss-Wright*, 694 F.2d at 304.

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the Legal Adviser's caveats with respect to the production of evidence as impractical and unconstitutional. *See ETC*, 659 F. Supp. at 1398.

The Legal Adviser's expressions of concern about the possible damage to foreign relations that may result from wide-ranging discovery against foreign officials should not have been interpreted as a sign of ambivalence about the act of state question. Rather, the Legal Adviser simply urged the court to exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities. This advice is far from impractical. Foreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad when compared to the European version of the fact-finding process. *See* Comment, *Antitrust Suits Involving Foreign Commerce*, 135 U. Pa. L. Rev. 1003, 1013-17 (1987). American judicial insensitivity to this foreign reaction has resulted in the enactment of "blocking" laws, *i.e.* laws that are specifically designed to block the Federal Rules' discovery provisions. *See id.* at 1016. The State Department's advice on this matter should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the executive has become familiar.

12. *See supra* note 6.

13. That respect is, in our judgment, enhanced when the Legal Adviser is one who, in his former capacity as a federal judge, has addressed act of state problems with marked sensitivity and rigor in a particularly demanding context. *See Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984).

This litigation falls squarely within the teaching of *Curtiss-Wright*. In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts. And, finally, the defendants in each case failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine. We therefore will reverse the court's grant of summary judgment, and will remand the case for further proceedings.[14]

III.

Having found that the act of state doctrine is no bar to appellant's claims, we turn to the remaining issues presented. First, ETC argues that the district court erred in dismissing the state and federal racketeering claims. Second, ETC seeks reversal of the district court's order barring the deposition testimony of defendant Carpenter, who asserted his Fifth Amendment privilege when examined about Kirkpatrick's Air Force contract bid. Third, all of the defendants challenge the district court's determination that ETC has standing to bring its antitrust and RICO claims. And, fourth, defendant DIC reiterates its contention that it is insulated from liability for any misdeeds of Kirkpatrick and Carpenter. We address these questions in turn.

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14. ETC has also argued that *Mannington Mills*' ten-factor balancing test should not result in a dismissal of the case on the basis of international comity. *See Mannington Mills*, 595 F.2d at 1297-98. Since the issue apparently was not raised below, and the record is substantially devoid of the sort of information called for by

A.

The district court dismissed ETC's state and federal RICO claims because it concluded that the amended complaint failed to allege facts establishing a pattern of racketeering activity. Noting that this court had not formulated a definition of the pattern requirement, the district court adopted a definition of pattern which would have required the appellant to allege facts establishing either (1) more than one criminal scheme undertaken by the defendants, or (2) a single, open-ended scheme. *See Environmental Tectonics v. W. S. Kirkpatrick & Co., et al.*, 659 F. Supp. 1381, 1390 (D.N.J. 1987). The district court found that ETC's amended complaint met neither prong of this test because it alleged a single scheme which was neither "continuous" nor "on-going."

The pattern requirement accepted by the district court has since been rejected by this court. In *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3rd Cir. 1987), this court held that allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, No. 87-5144 Slip Op. at 24 (March 29, 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged

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the *Mannington Mills* test, it would be inappropriate for this issue to be examined for the first time on appeal.

in the amended complaint -- mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act -- were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir. 1987). But, to focus only on the series of payments -- i.e., one bribe divided into four parts -- is to ignore the complexity of Kirkpatrick's scheme. If the appellant's allegations are true, a European conglomerate, and two American corporations -- successfully, and over a two-year period -- organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3rd Cir.

1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Bartichecк*'s specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the statute. ETC may proceed on its RICO claim, and -- assuming, as have the district court and the parties, that the pattern requirements for the New Jersey Anti-Racketeering act are substantially similar -- on its state racketeering claims as well.

B.

ETC's final ground of appeal challenges the district court's decision that the Fifth Amendment privilege against self-incrimination shielded Carpenter from responding to deposition questions the answers to which might yield evidence that Carpenter had committed crimes under Nigerian law. ETC argues that the record does not establish any significant likelihood that responding to deposition questions here would expose Carpenter to trial in the courts of Nigeria. ETC also argues that, in any event, the Fifth Amendment is not a shield against foreign prosecution.

As summarized by the court below, the evidence adduced by Carpenter to establish the risk of criminal prosecution in Nigeria was as follows:

> Prior to his deposition, Carpenter submitted an affidavit...setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual basis of the privilege. As discussed earlier

> in the opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media attention and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian contract. Akindele further warned Carpenter not to travel to Nigeria and to exercise care in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." This information, which originally came from Interpol, was relayed to Carpenter. Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated."

The magistrate reviewed this evidence in the light of the factors relevant to the risk of foreign prosecution enumerated by the Second Circuit in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2nd Cir. 1982):

> [T]he court in resolving the issue [must focus on] whether there is an existing or potential prosecution of [the witness]; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a

likelihood that his testimony given here would be disclosed to the foreign government.

The magistrate found "that, by defendant Carpenter's affidavit, there is a real fear that he might involuntarily be subject to the criminal jurisdiction of Nigeria." The district court concluded that "[t]he Magistrate's decision has not been shown to be clearly erroneous or contrary to law." *ETC*, 659 F. Supp. at 1401.

We disagree. We have no doubt that the testimony ETC sought to elicit at deposition might aid in a criminal prosecution of Carpenter by Nigeria, if such a prosecution were undertaken. However, it is not contended that Carpenter, who has already pleaded guilty to the criminal charges brought by the United States, could be extradited to Nigeria for the alleged bribes. The entire risk of prosecution in Nigeria rests, therefore, on the possibility that Carpenter would be kidnapped by Nigerian authorities; and we do not think that possibility comes close enough to being a significant likelihood to carry the day. We are prepared to assume that a real fear, substantially grounded in fact, of being kidnapped by the agents of a foreign government with a view to prosecution by that government might well justify a witness' assertion of his or her fifth amendment privilege. But the fact that Carpenter has been admonished to avoid being kidnapped does not, in our judgment, constitute substantial proof that the feared conspiracy is more than gossamer. Nothing in this record supports an inference that kidnapping foreigners not resident in Nigeria in order to bring them to trial in Nigeria is characteristic of Nigerian law enforcement personnel.

That Carpenter is sincere in his apprehension of the risk does not mean that the apprehension justifies his assertion of the privilege. "The apprehension," as the court noted in *Flanagan*, "must be a real and

reasonable one, based on objective facts as distinguished from subjective...speculation." *Flanagan*, 691 F.2d at 121. And this is because, as the Supreme Court made plain in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), rejecting the Fifth Amendment claim presented there, "the privilege protects against real dangers, not remote and speculative possibilities." In short, we think the record made by Carpenter does not constitute substantial evidence of "real dangers."[15]

As noted above, ETC further contends that the Fifth Amendment is only a domestic shield, which guards against self-incrimination in other American courts, whether state or federal,[16] but does not protect

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15. Carpenter might have met his burden under this standard if he had been officially warned by the United States Government to forgo travelling abroad in order to avoid capture by Nigerian agents seeking to bring him to Nigeria for trial. Other evidence -- *e.g.* a pending prosecution or the institution or threatened institution of extradition proceedings -- might also have supported Carpenter's assertion of the privilege.

The justifications that Carpenter advances in this case, however, amount to nothing more than speculation about Nigeria's intentions. First, the warnings by Benson Akindele, who does not appear to be a Nigerian official, do not, standing alone, provide a basis for Carpenter's fear of prosecution. And the somewhat ambiguous representation of Assistant United States Attorney Steven Levy with respect to Nigeria's "vital interest" in the American prosecution of Carpenter, *supra* note 5, falls short of suggesting that Nigeria was preparing to prosecute Carpenter.

Second, what Carpenter identifies as a warning from the United States is actually something more remote. The record suggests that the Nigerian government, if interested at all in Carpenter, sought only to question him about others rather than prosecute him. Moreover, Carpenter himself was not troubled enough by the warning to stay in the United States: he later travelled to the Bahamas. To justify his invocation of the privilege, Carpenter would have had to come forward with a good deal more than he presented to the magistrate.

16. *See Murphy v. Waterfront Commission*, 378 U.S. 52 (1962).

one from American court orders which would compel testimony that might threaten incrimination in the courts of a foreign sovereign. That issue, which the Supreme Court found unnecessary to resolve in *Zicarelli, supra*, has generated a contrariety of views in the lower courts. The Tenth Circuit, *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970), and the Fourth Circuit, *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986), have rejected the contention that the Fifth Amendment is extra-territorial in scope. The chief authority in support of an extra-territorial application is Judge Newman's opinion in *In re Cardassi*, 351 F. Supp. 1080 (D.Conn. 1972). *Cardassi* has been subscribed to by Judge Hufstedler, concurring in *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1169 (9th Cir. 1979), and has been followed by two district courts in this circuit. *See United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981); *United States v. Kowalchuk*, No. 77-118 (E.D.Pa. 1978).[17]

Because we have determined that the present record does not, in any event, present a substantial risk that Carpenter would be subject to prosecution in the courts of Nigeria, we find it unnecessary to resolve the important constitutional question as to the reach of the Fifth Amendment that would otherwise be presented.

C.

On cross-appeal, defendants raise two objections to rulings by the district court. The first contention, joined in by all of the defendants, is that the district court erred in concluding that ETC had standing to

17. The question has been discussed, but not resolved, by the District of Columbia Circuit in *In re Sealed Case*, 825 F.2d 494, 497 (D.C.Cir. 1987), and by the Second Circuit in *Flanagan*, 691 F.2d at 124.

press its antitrust, RICO, and New Jersey Anti-Racketeering Act claims. This argument is premised on what the defendants perceive as factual deficiencies in ETC's amended complaint. In their view, ETC has not pleaded any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the Air Force contract. The defendants also argue that ETC has pleaded no facts that would establish the payment of illegal commissions from the defendants to Nigerian government officials. The district court concluded that the amended complaint's allegations were sufficient to confer standing on ETC, and we agree with that assessment.

As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).[18] Congress enacted section 2(c), the Act's brokerage provision, primarily to curb one particular abuse by large chain store buyers, namely the use of "dummy" brokerage fees as a means of securing price rebates. *See Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985). The section has also been

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18. 15 U.S.C. § 13(c) states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

applied, however, in cases that involve commercial bribery. *See id.* at 371; *see also Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied* 383 U.S. 936 (1966)(company which bribed state purchasing agent liable to competitor for state contract under 2(c)).

Although this court has concluded that as a general matter commercial bribery is actionable under 2(c), it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa. *See Seaboard Supply*, 770 F.2d at 372. The amended complaint alleges that Kirkpatrick paid the illegal commissions to the Akindele-controlled corporations, from which they were distributed to unnamed Nigerian officials. Though the allegation is not a detailed one, it clearly charges that illegal payments were passed from a seller to a buyer -- a violation of 2(c).

Not every plaintiff who alleges an actionable claim under the antitrust laws has standing, however, to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged. *See Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours and Co.*, 826 F.2d 1235, 1240 (3rd Cir. 1987). A private plaintiff does not have to prove price discrimination to recover for a violation of 2(c), *Seaboard Supply*, 770 F.2d at 371 n.3, but the plaintiff must still meet the standing requirements to proceed. *See Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270-72 (5th Cir. 1979).

Because of the standing doctrine's malleability, it would be difficult to define with precision the contours of the class of potential plaintiffs who have standing to

assert 2(c) claims. Indeed, this court's case-by-case approach to the standing requirement argues against such an attempt. *See Alberta Gas Chemicals*, 826 F.2d at 1239-41. We need not do so in this case, moreover, because it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber. *See Cool Attic*, 587 F.2d at 271-72; *Municipality of Anchorage v. Hitachi Cable*, 547 F. Supp. 633, 640 (D. Alaska 1982); *Computer Statistics v. Blair*, 418 F. Supp. 1339, 1348 (S.D. Tex. 1976); III E. Kintner and J. Bauer, *Federal Antitrust Law* § 26.12, at 529-30 (1982).

We agree with the district court that ETC's amended complaint alleged sufficient facts to establish the kind of injury that would confer standing to bring a claim against the defendants. Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid. As the district court noted, short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from defendants' alleged violation of section 2(c).

The question of ETC's standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, ETC need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. *See Town of Kearny*, 829 F.2d at 1268 (quoting *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987)). ETC's allegations in the amended complaint of injury from the bribery scheme -- a scheme that the amended complaint charges with sufficient factual specificity -- meet this standard. We also assume, as did the district

court and the parties, that the New Jersey Anti-Racketeering Act's requirements are essentially the same as the federal standards.

D.

Finally, defendant DIC, one of Kirkpatrick's corporate parents, contends that the it is entirely immune from liability. ETC claims that liability for the alleged wrongful acts of the Kirkpatrick group can be imputed to DIC on either of two theories: by piercing the defendant's corporate veil, *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986), or by finding that Carpenter acted as DIC's agent in carrying out the bribery scheme, *Japan Petroleum Co. v. Ashland Oil*, 456 F. Supp. 831 (D. Del. 1978). The district court found that the amended complaint minimally alleged "a relationship among [DIC], IDC, Carpenter, and Kirkpatrick sufficient to support the potential imposition of liability upon [DIC] or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick." *ETC*, 659 F. Supp. at 1388. The court also concluded that ETC and the defendants should have the opportunity to proceed with discovery so that the facts defining the relationship of DIC, IDC, Carpenter and Kirkpatrick may be fully developed. *See id.* at 1389. We find no reason to question such a course, which should produce a record on the basis of which the question of DIC's liability can be properly determined. *See Craig v. Lake Asbestos of Quebec, Ltd.*, No. 87-1254 (3rd Cir. March 31, 1988).

Conclusion

We therefore will reverse the district court on its act of state decision, its dismissal of plaintiff's RICO and Anti-Racketeering Act claims, and its affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. As to the

other issues, we will affirm the district court. We will remand this case for proceedings consistent with this opinion.

APPENDIX

United States Department of State
The Legal Adviser
Washington, D.C. 20520
December 10, 1986

The Honorable
Alfred J. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

Re: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co. Inc., et al.*, Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions. . . .
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

Abraham D. Sofaer

cc: Alan A. Turner, Esq.
Thomas H. Sear, Esq.
Lawrence S. Horn, Esq.
Theodore V. Well, Esq.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,
Plaintiff,

v.

W.S. KIRKPATRICK & CO., INC., et al.,
Defendants.

Civ. A. No. 86-796.

United States District Court,
D. New Jersey.

May 1, 1987.

Corporation engaged in manufacture and sale of aircraft equipment and facilities brought action against corporate competitors and individuals, seeking damages in connection with award of contract with government of Nigeria, which was allegedly procured in violation of antitrust and racketeering laws. Defendants moved to dismiss for failure to state claim upon which relief could be granted. The District Court, Lechner, J., held that: (1) allegations that competitors engaged in mail and wire fraud and committed bribery were insufficient to establish pattern of racketeering activity, and (2) act of state doctrine precluded action.

Dismissed.

Thomas B. Rutter, and Alan Turner, Rutter, Turner & Stein, Haddonfield, N.J., for plaintiffs.

Thomas H. Sear, and Rhonda D. Orin, Spengler, Carlson, Gubar, Brodsky & Frischling, New York City, and Lawrence S. Horn, Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, Newark, N.J., for defendant Kirkpatrick and DIC Holding.

Robert L. Krakower, Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, N.J., for defendant Harry Carpenter.

Robert W. Delventhal, Crummy, DelDeo, Dolan, Griffinger & Vecchione, Newark, N.J., for defendants Emro and Ruppert.

Jerome L. Merin, Asst. U.S. Atty., Office of the U.S. Atty., Newark, N.J., for Dept. of Justice.

Dominic F. Amorosa, Short Hills, N.J., for defendant John M. Krankel.

John J. Barry, Clapp & Eisenberg, Newark, N.J., for defendant R.H. Edwards.

OPINION

LECHNER, District Judge.

This action was brought by Environmental Tectonics Corporation, International ("ETC") against W.S. Kirkpatrick, Inc. and certain other corporations and individuals. ETC seeks damages in connection with the award of a contract which contract ETC alleges was procured in violation of antitrust and racketeering laws. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be granted. ETC has filed an amended complaint more specifically alleging certain aspects of the original complaint while adding and dropping certain defendants.

The motions were filed by defendants pursuant to Federal Rule of Civil Procedure 12(b)(6). With the exception of the act of state

portion of these motions, it is assumed for the sole purpose of the disposition of these motions the facts alleged in the amended complaint are true and all reasonable inferences have been drawn in favor of ETC. *See D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir.1984). Accordingly, the description of the facts concerning these motions is based in large part upon ETC's allegations. With regard to the act of state argument, additional information has been requested from counsel and, as well, from the United States Department of State [1] which information has been considered together with the exhibits attached to ETC's brief in opposition. Therefore, this aspect of the defendants' motions will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; all parties have been so informed and have been given an opportunity to respond. This opinion also addresses plaintiff's appeal of three orders entered by Magistrate Hedges.

I. *Procedural History*

ETC filed a three count complaint naming the following defendants: W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick")(erroneously named as W.S. Kirkpatrick, Inc.); Development International Corporation ("DIC"); DIC (Holding) Inc. ("Holding"); IDC International S.A. Luxembourg; Harry G. Carpenter ("Carpenter"); and Benson "Tunde" Akindele ("Akindele"). The complaint alleged that defendants' tactics in obtaining a contract with the government of Nigeria violated sections of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962, *et seq.*), the New Jersey Anti-Racketeering Act (§ 2c:41-2, *et seq.*) and the Robinson-Patman Act (15 U.S.C. § 13(c) *et seq.*)

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[1] The Department of State was notified by telephone of this matter on September 10, 1986 (a copy of the transcript of the telephone call was made available to all parties). In addition, a copy of all relevant documents was forwarded to the Department of State on September 12, 1986. Because of numerous internal problems, the Department of State repeatedly requested extensions of the time within which to respond to the issues presented by the act of state portion of the motions. On December 10, 1986 a response of the same date was received from the Department of State.

ETC filed an amended complaint which added new counts and more specifically alleged certain aspects of its original complaint. The amended complaint added the following defendants: John M. Krankel; W.S. Kirkpatrick & Co. International ("Kirkpatrick International"); International Development Corporation, S.A. ("IDC"); Emro Engineering Co., Inc. ("Emro"); Robert W. Ruppert; Ross E. Saxon; and R.H. Edwards. DIC was not named in the amended complaint. The amended complaint recited the original counts and added a defamation count against Emro and Ruppert, as well as allegations of interference with prospective contract relations against all the defendants.[2]

Kirkpatrick moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Holding, DIC, Carpenter, Krankel, Kirkpatrick International, and Edwards joined the motion brought by Kirkpatrick. These defendants are referred to herein collectively as the "Moving Defendants".[3]

[1] The motions collectively raise four distinct issues: first, whether ETC's pleadings allege facts establishing that Carpenter and Kirkpatrick are sufficiently related to Kirkpatrick's corporate parents to warrant the inclusion of the corporate parents as defendants to this action; second, whether ETC's pleadings allege facts showing ETC suffered injury as a result of defendants' alleged antitrust and RICO violations; third, whether ETC's pleadings allege facts to establish a "pattern of racketeering activity," as required by the federal and state racketeering laws; and fourth, whether ETC's claims are barred by the act of state doctrine.[4]

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[2] This case and the motions filed were reassigned to this Court by Order, dated July 16, 1986.

[3] Although the Moving Defendants' motions are brought against the sufficiency of the pleadings as set forth in the original complaint, upon review of the record the issues raised by the motions are properly raised against the sufficiency of the pleadings as set forth in the amended complaint. I shall consider the motions accordingly.

[4] The results of the third and fourth issues, the RICO and the act of state portions of the motions, are applicable to those defendants who have not so moved or have not yet been served with the complaint or not yet answered the complaint.

II. *Facts*

In 1954, Carpenter became an employee of Kirkpatrick, a New Jersey corporation, which is involved in the business of selling and brokering aircraft equipment and facilities. At some point prior to 1978, Carpenter became a major shareholder, Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick.

In 1978, Carpenter sold all of his stock and equity interest in Kirkpatrick to Holding. Also in 1978, pursuant to the terms of a consulting and employment agreement, Carpenter agreed to remain as Chairman of the Board and Chief Executive Officer of Kirkpatrick for a period of five years. The stock of Holding was, at all times relevant to this motion, owned by IDC, a Luxembourg corporation.

ETC is a Delaware corporation having its principal place of business in Pennsylvania and is engaged in the business of manufacturing and selling aircraft equipment and facilities.

At some point during the period 1980-1981, both ETC and Kirkpatrick or Kirkpatrick International sought to procure a contract with the Republic of Nigeria to construct an aeromedical facility at Kaduna Air Force Base in Nigeria and to provide equipment for that facility (the "Nigerian Contract"). In an effort to obtain the Nigerian Contract, Carpenter negotiated an agreement with Akindele, A Nigerian citizen (the "Akindele Agreement"), whereby Akindele was to act on behalf of certain defendants in seeking to procure the Nigerian Contract. The Akindele Agreement provided that certain defendants would pay a "commission" to two Panamanian entities controlled by Akindele if the Nigerian Contract was procured for defendants. The commission was to equal 20% of the Nigerian Contract price; a majority of the commission was to be paid, in turn, as bribes to officials of the Nigerian Government for the award of the Nigerian Contract. During this same period, ETC was negotiating with Nigerian officials to procure the Nigerian Contract, and at some point submitted a bid for the Nigerian Contract.

On March 19, 1982 the Nigerian Contract was awarded to Kirkpatrick International, a wholly-owned subsidiary of Kirkpatrick. Payments on the Nigerian Contract by the Nigerian Government began in September, 1982 and shortly thereafter defendants' payments of the agreed upon commissions to the two Panamanian entities were effected. The alleged commissions were made on four separate occasions, September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983, and totaled approximately $2 million. ETC alleges Kirkpatrick International obtained the Nigerian Contract as a result of the commissions paid or promised as bribes to Nigerian officials who otherwise would have awarded the Nigerian Contract to ETC.

Carpenter was prosecuted for a violation of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.* (Supp. V 1981) ("FCPA").[5] On October 2, 1985 the United States Attorney for the District of New Jersey filed in the Carpenter matter an offer of proof which was signed by Carpenter. This offer of proof establishes certain facts which include the Akindele Agreements and the payment of the commission to the two Panamanian entities in connection with the Nigerian Contract. However, the offer of proof does not establish the payment or promise of bribes to Nigerian government officials. Kirkpatrick was also prosecuted for violations of FCPA. Both Carpenter and Kirkpatrick pled guilty to violation of FCPA.

On January 6, 1986 at the sentencing of Kirkpatrick, Assistant United States Attorney Steven Levy made the following representations to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. ... I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political

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[5] This document and a transcript of a sentencing of Kirkpatrick for violation of FCPA were submitted by ETC in opposition to defendants' motions.

> impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,....

(Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22) (hereinafter "Levy Representations".)

The views of the United States Department of State, dated December 10, 1986 (the "State Department Position") indicate two positions relevant to this matter:

> If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the [Nigerian] contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.
>
> . . . . .
>
> Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may

> seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

State Department Position, at 2-3 (attached as Appendix A).

The government of "Nigeria was informed not later than the end of November, 1985 [of the bribery charges with regard to the Nigerian Contract] as a result of the publicity surrounding the admissions of guilt [to violations of FCPA] and sentences with respect thereto on behalf of Kirkpatrick and Carpenter...." See submission, dated August 26, 1986, of counsel to plaintiff.

On July 31, 1986 counsel for ETC forwarded a letter to the Nigerian Embassy in Washington, D.C. to request a declaration from the Republic of Nigeria "to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America." The stated purpose of this requested declaration was to nullify the defendants' "act of state" argument to dismiss ETC's complaint.

To date, it appears the Republic of Nigeria has not responded to either the publicity surrounding the FCPA prosecutions or the July 31 letter not has it taken any action with regard to the allegations surrounding the Nigerian Contract.

III. *Discussion*

A. *Inclusion of Holding and IDC*

In its complaint, ETC appears to present two theories supporting the imputation of liability to Holding and IDC for the alleged wrongful acts of Kirkpatrick and Carpenter: first, that Carpenter acted as án agent of Holding and IDC when he negotiated the Akindele Agreement; and second, that Kirkpatrick

was a "mere instrumentality" of Holding and IDC. Holding and IDC maintain ETC has failed to allege facts showing Holding and IDC are sufficiently related to, or responsible for, Kirkpatrick and Carpenter to support the imposition of liability on Holding and IDC for actions taken by Kirkpatrick and Carpenter. In addition, Holding and IDC maintain ETC has failed to allege facts establishing Carpenter acted as an agent, servant or employee of Holding and IDC during negotiations in connection with the Nigerian Contract. In support of their position, Holding and IDC assert that ETC's pleadings on these issues establish nothing more than Holding and IDC own Kirkpatrick and that Carpenter entered into an employment contract with Kirkpatrick and/or Holding.

[2] Whether an agency relationship exists between a parent corporation and employees a parent corporation and employees or officers of its subsidiary or whether a subsidiary is an instrumentality of the parent is normally a question of fact and degree. The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary. See *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F.Supp. 831, 840-41 (D.Del.1978). *Accord*, *Hoffman v. United Telecommunications, Inc.*, 575 F.Supp. 1463, 1478 (D.Kansas 1983).

[3] In addressing the problem of relationships between parent and subsidiary corporations, courts have cited the criteria set forth in *Fish v. East*, 114 F.2d 177, 191 (10th Cir.1940), to aid in determining whether a subsidiary is such an instrumentality of the parent corporation that treating the two as one is warranted. *See, e.g., Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir.1963); *Hoffman*, 575 F.Supp. at 1478; *Japan Petroleum Co., Ltd.*, 456 F.Supp. at 841. The factors to be examined include ownership of the subsidiary's stock, identity of officers and directors of the corporations, financial arrangements of the corporations, responsibility over day-to-day operations of the subsidiary and payment of the subsidiary's salaries and expenses. These criteria aid the Court in determining whether:

> from all the facts and circumstances it is apparent that the relationship between the parent and subsidiary is so intimate, the parents control over the subsidiary is so dominating, and

> the business and assets of the two so mingled, that recognition of the distinct entity would result in an injustice to third-party persons....

Hoffman, 575 F.Supp. at 1478 (quoting from two other cases).

[4] ETC's amended complaint alleges (1) that in 1978 Carpenter entered into an employment contract with Kirkpatrick and/or Holding; (2) that in 1978 Carpenter sold all of his "major" shareholdings and equity interest in Kirkpatrick to Holding; and (3) that various financial aspects of the relationships among the corporate defendants indicate they are engaged, to some extent, in a single economic enterprise.[6] Although ETC's pleadings are not exhaustive, it cannot be said, as a matter of law, the pleadings fail to allege a relationship among Holding, IDC, Carpenter and Kirkpatrick sufficient to support of the potential imposition of liability upon Holding or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick.

As Holding and IDC point out in their brief, "whether an agency relationship has been created is a factual question." (Memorandum of DIC and Holding at 14.) ETC relies on *Melikian v. Corradetti*, 791 F.2d 274, 282 (3d Cir.1986) which, although not directly on point, provides some guidance: "[t]he issue of whether the corporate veil can be pierced is primarily a question of fact. Plaintiffs have alleged sufficient facts to state a claim and should be permitted to proceed with discovery to further develop the factual record." Accordingly, the ETC pleadings are adequate in this regard.

B. *ETC's Standing*

[5] The Moving Defendants argued that under the facts pleaded in ETC's complaint, ETC lacks standing to bring its antitrust

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[6] Specifically, the amended complaint alleges that Holding is the "manager" of Kirkpatrick and that Holding has authority over financial aspects of Kirkpatrick's operations, including payments made in connection with the Nigerian Contract.

and RICO claims against them. The Moving Defendants contend ETC's pleadings fail to establish the requisite injury because there are insufficient facts pleaded to show ETC would have won the Nigerian Contract but for the improper actions of the Moving Defendants. Although the original complaint may have been insufficient, the amended complaint pleads ETC's injury sufficiently to survive these motions to dismiss. The amended complaint alleges ETC was competing with the Moving Defendants for the Nigerian Contract and "upon information and belief", but for the alleged improprieties of the Moving Defendants, ETC would have obtained the Nigerian Contract. (Amended Complaint ¶ 40.) Absent unequivocal evidence that ETC was next in line to obtain the Nigerian Contract, ETC could not have pleaded its injury with more particularity. Facts may surface showing these allegations are untrue; for present purposes, however, ETC has alleged injury as a result of the actions of the Moving Defendants and has standing to bring its claims.

C. *Pattern Requirement of RICO*

RICO prohibits the use or investment of funds in an enterprise involved in interstate commerce if the funds are "derived, directly or indirectly, from a pattern of racketeering activity . . . ." 28 U.S.C. § 1962(a). RICO defines a pattern of racketeering activity as requiring "at least two acts of racketeering activity . . . ." 28 U.S.C. § 1961(5).

ETC contends the four separate payments of the commissions and the further payment of those commissions as bribes constitute separate acts of racketeering activity to support a finding of the requisite pattern. The Moving Defendants argue RICO's "pattern" mandate requires a showing of separate criminal episodes.

Prior to the Supreme Court's decision in *Sedima, S.P.R.L. v. Imprex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), courts were divided over the proper construction and application of RICO's pattern of racketeering activity requirement. Some courts held multiple criminal acts in furtherance of a single criminal scheme constituted the requisite pattern. *See, e.g.*,

United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir.1978) (each mailing in furtherance of scheme to defraud constitutes a separate act of racketeering, thereby establishing a pattern). Other cases held multiple criminal episodes were necessary to establish the pattern of racketeering activity requirement. *See, e.g., Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6, 12-13 (W.D.Pa.1981) (series of payments in single bribery scheme insufficient to establish RICO pattern).

The Supreme Court's *Sedima* decision offers some guidance in resolving the pattern controversy. Quoting from the Senate Report on RICO, the Court stated: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective . . . . S.Rep. No. 91-617 p. 158 (1969)." *Sedima*, 105 S.Ct. at 3285 n. 14. The Court's opinion then referred to another section of RICO providing that " 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act." *Id.*

Many courts have relied on footnote 14 of the *Sedima* opinion in declining to find a pattern of racketeering activity where the alleged acts were committed in furtherance of a single fraudulent scheme posing no threat of continuing activity. *See, e.g. Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-57 (8th Cir.1986) (several acts of mail and wire fraud in pursuit of single isolated conversion or theft claim fail to establish requisite pattern); *Emmanouilides v. Buckthorn, Ltd.*, 642 F.Supp. 964, 966 (S.D.N.Y.1986) (several fraudulent mail and wire communications not a pattern; "rather, they are components of a single activity, the alleged vessel fraud"); *Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F.Supp. 1532, 1534 (D.Mass.1986) ("In applying civil RICO, therefore, it is essential to identify threats of continuing criminal activity, as opposed to isolated criminal events."); *Temporaries, Inc. v. Maryland Nat'l Bank*, 638 F.Supp. 118, 124 (D.Md.1986) ("Without an open-ended series of activities which comprise a continuing scheme, more

than one scheme should be required to establish a 'pattern' of racketeering activity")' *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 8 (D.N.J. January 9, 1986) [available on Westlaw, DCTU database] ("the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstance, is completely undimensional. It suggests no expansion, no ongoing design, no continuity, such as was the target of Congress in RICO"); *Allington v. Carpenter*, 619 F.Supp. 474 (C.D.Cal.1985) (three acts of wire fraud with single victim and scheme insufficient to establish pattern); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828 (N.D.Ill.1985) (mailing of subcontract and several kickback payments in connection with single kickback scheme insufficient to establish pattern).

Some of these courts have argued the Congressional intent behind RICO's pattern requirement was to reach only multiple criminal episodes, such an interpretation being "consistent with the connotation of multiple events implicit in the term 'pattern.' " *Carpenter*, 619 F.Supp. at 478. *See also Fulmer*, 785 F.2d at 255-57; *Inryco*, 615 F.Supp. at 831. Other courts have asserted a RICO pattern may be established by showing the existence of either (1) more than one unlawful scheme, or (2) "an open-ended continuous scheme which contains a multiplicity of predicate acts." *Temporaries, Inc.*, 638 F.Supp. at 123. *See also Eastern Corporate Federal Credit Union*, 639 F.Supp. at 1535-36; *Kredietbank*, slip. op. at 7-8.

[6] Identification of such an "open-ended continuous scheme" requires an assessment of various factors indicative of the scheme's "continuity." Such factors include "the length of the scheme, the number of predicate acts and the number of victims of such acts, and the likelihood that the scheme would continue indefinitely." *Temporaries, Inc.*, 638 F.Supp. at 123, n. 1A. *See also, United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir.1986) ("when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise [RICO pattern exists]").

[7] The second approach for dealing with RICO's pattern requirement offers greater flexibility and appears to be more in line with the Congressional intent behind enactment of RICO. Because it is possible a single unlawful "scheme" could involve sufficient instances of "racketeering activity" amounting to a "pattern" of activity warranting liability under RICO, a blanket rule that "pattern" requires more than one scheme is unsatisfactory. An approach looking for either (1) more than one scheme, or (2) an open-ended scheme, "would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy – those which evidence a true pattern of racketeering activity." *Temporaries, Inc.*, 638 F.Supp. at 124.[7]

[8] ETC claims certain defendants engaged in mail and wire fraud and committed bribery in making the four separate payments to the Panamanian entities for payment to Nigerian officials. These four payments, however, were only in furtherance of the single alleged bribery scheme used to obtain the Nigerian Contract, a scheme which cannot be said to be ongoing or otherwise comprising a "multiplicity of predicate acts." As the cases cited above establish, such an allegation fails, as a matter of law, to set forth a pattern of racketeering activity as required by RICO.

[9] The amended complaint alleges, "upon information and belief ", certain defendants have engaged in other improper actions similar to those alleged to have occurred in connection with the Nigerian Contract. (Amended Complaint ¶ 57.) However, the allegation is devoid of factual support and without some such support cannot establish a RICO "pattern" of racketeering activities. RICO is, in essence, a fraud statute, and as Federal Rule

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[7] Some courts since the *Sedima* decision have adopted, or favorably referred to, a broad interpretation of the RICO pattern. *See, e.g. R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir.1985); *Systems Research, Inc. v. Random, Inc.*, 614 F.Supp. 494 (N.D.Ill.1985). However, these cases are not controlling, and, in light of the logical reasoning of the many cases cited above, they are ultimately unpersuasive.

of Civil Procedure 9(b) provides, the facts giving rise to allegations of fraud must be pleaded with some degree of particularity. To hold otherwise would subvert the Congressional intent behind enactment of RICO; every fraud plaintiff could assert a RICO claim simply by pleading, upon information and belief, the existence of another scheme similar to the one truly at issue.

The inherent similarity of a common law fraud action and a federal RICO action was implicitly recognized by the Third Circuit in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). In that case, the Court reversed a district court dismissal of a RICO complaint. The plaintiff in the case claimed to have been defrauded by the defendant over a twenty-one month period in connection with the sale of some 700 pieces of industrial equipment. Plaintiff claimed defendant had made numerous misrepresentations and omissions in connection with the sale of the equipment, and that such conduct established a pattern of racketeering activity as required by RICO. The district court dismissed the RICO claim because "the complaint failed to set forth 'with even minimal particularity the details of the alleged fraud or misrepresentation.' " *Id.* at 791. The Third Circuit reversed, stating:

> The complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation. In sum, we conclude that [plaintiff] has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9(b).

Id., (footnote omitted). By contrast, the allegation in paragraph 57 of the amended complaint in this action cannot be said to "adequately describe the nature and subject" of related racketeering activities on the party of the defendants.

[10] ETC has had an opportunity to amend its pleadings so as to make a prima facie showing of the existence of a RICO

pattern. Because ETC has failed to demonstrate the defendants or certain of them have engaged in a pattern of racketeering activity, the RICO claims must be dismissed.[8]

D. *Act of State*

In their Reply Memorandum, the Moving Defendants argue the act of state doctrine bars judicial determination of ETC's claims. Specifically, the Moving Defendants contend that in order to prove violations of the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act or any of these statutes, ETC must establish officials of the Government of Nigeria were paid or knew they would be paid bribes for awarding the Nigerian Contract to Kirkpatrick, and that but for the payment of the bribes, or promise of payment, ETC would have been awarded the Nigerian Contract. The Moving Defendants argue such proof requires a judicial investigation into acts of the Government of Nigeria or would interfere with the conduct of foreign policy by the Executive Branch of the federal government, either of which is barred by the act of state doctrine.

The act of state doctrine has been defined as one of judicial abstention from an inquiry into the validity of an act by a foreign government within the scope of its sovereignty. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir.1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979); *Timberland Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir.1976), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985). Over the years courts have cited several theoretical foundations for the act of state doctrine. In an early application,

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[8] Since ETC concedes the provisions of the New Jersey Anti-Racketeering Act are to be interpreted in the same way their RICO counterpart provisions are interpreted (Brief of ETC in Opposition to Motions to Dismiss at 16), the New Jersey Anti-Racketeering claims must also be dismissed for failure to set forth the requisite "pattern of racketeering activity."

the Supreme Court explained the doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This language reflects the Court's deference to the inherent nature of sovereign authority and principles of international law upon which the doctrine was traditionally applied. The Third Circuit similarly opined that an act within the sovereign power of a foreign state or by its authorized agent within the scope and authority of the office cannot be questioned or made the subject of proceedings in our courts. *Mannington Mills*, 595 F.2d at 1292.

"The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983). It is now also recognized the foundation of the act of state doctrine is rooted in this principle – the separation of powers among the several branches of government. *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 937-38; *Curtiss-Wright*, 694 F.2d at 303. The separation of powers rationale is illustrated by the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, *supra*. Applying the act of state doctrine, the Court focused on protecting the basic relationships among branches of government in a system of separation of powers, and not hindering the executive's conduct of foreign policy by judicial review of foreign acts. *Id.*, at 423, 84 S.Ct. at 937-38.

The act of state doctrine has also been interpreted through "notions of comity and a conflict of laws theory that foreign law

is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction." *Mannington Mills*, 595 F.2d at 1292, *citing*, Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum.L.Rev. 1247, 1255 & n. 36 (1977). Thus, the "act of state" is deemed valid under the law of the land where it occurred and is applied as the law of the forum.

[11, 12] Keeping in mind the multi-faceted reasoning offered to support the act of state doctrine, a keystone in its application is the avoidance of "passing on the validity" of acts of foreign governments and the avoidance of conduct, which if effected, "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 938. Therefore, if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir.1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). This has been held to be equally true of judicial inquiries which would impugn or question the nobility of a foreign nation's motivations. *Timberlane*, 549 F.2d at 607.

[13] The act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the affect upon the parties, and the affect upon the internal affairs of the foreign sovereign and the foreign policy of this country. *See* Restatement (2d) of Foreign Relations Law of the United States § 41, Comment d.

[14] In order for ETC to prevail on its claims under the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act, it must be demonstrated the defendants or certain of them intended to wrongfully influence the decision to

award the Nigerian Contract by payment of a bribe,[9] that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that "but for" the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract. Cf. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1960); *Clayco Petroleum*, 712 F.2d at 407; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76 (2d Cir.1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *Salerno v. American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir.1970), *cert. denied*, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971). Resolution of these critical issues necessarily requires judicial inquiry into the acts of the Government of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country. *See* Levy Representations and State Department Position. Cases interpreting the act of state doctrine suggest this is the type of situation which precludes judicial inquiry.

Review of other decisions on this point begins with *Clayco Petroleum*, a case involving a strikingly similar factual situation. In *Clayco*, an oil company sued one of its competitors under the Robinson-Patman Act and other antitrust laws alleging its competitor had made secret payments to an official of Umm Al Qaywayn[10] in order to obtain an offshore oil concession. The trial court granted defendant's motion to dismiss on the ground the action was precluded by the act of state doctrine.

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[9] Decree number 38, dated November 22, 1975, of the Federal Military Government of the Republic of Nigeria lists certain prohibited corrupt practices together with the punishment for such corruption. Included within this statute is a prohibition of an individual in the employ of the government receiving or soliciting money for the showing of a favor such as the award of a contract. Decree number 38, Part I.

[10] The *Clayco Petroleum* court noted the government of Umm Al Qaywayn is a foreign sovereign for purposes of the act of state doctrine. *Clayco Petroleum*, 712 F.2d at 405 n. 1.

The Ninth Circuit found the actions complained of to be within the purview of the act of state doctrine because the sovereign activity effectuated "public" rather than private interests.[11] *Clayco Petroleum*, 712 F.2d at 406. In making the public versus private interest distinction, the court noted "[t]his case differs from those relied upon by [plaintiff], in which sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws." *Id.*

The actions which form the basis of ETC's complaint are analogous to those the *Clayco* court found to effect a public interest. Specifically the awarding of the Nigerian Contract by the Ministry of Defense is a decision which may only be made by the Government of Nigeria, its officials or representatives. Similarly, the offshore oil concession in *Clayco* was granted by the Government of Umm Al Qaywayn, its officials (the Petroleum Minister), or its representatives.

ETC's characterization of the act in question, as non-public or commercial, is unfounded. Whether it is the purpose or the nature of the act which determines commercial versus sovereign status, the award of the Nigerian Contract by the Government of Nigeria is a sovereign act. For purposes of applying the act of state doctrine to the present facts, the distinctions between the grant of an oil lease and the award of a military contract are not persuasive.

[15] Although ETC has suggested it is not in fact complaining of the actions of the Nigerian Government, its officials or representatives, and does not characterize the Government of the Republic of Nigeria or any of its agents as "co-conspirators", an indispensible ingredient of ETC's cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate

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[11] The distinction between situations in which a government acts in a commercial rather than a public capacity, the "commercial exception" has not been accepted by a majority of the Supreme Court. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706, 96 S.Ct. 1854, 1861-1867, 48 L.Ed.2d 301 (1976) (White, J., joined by three other Justices).

Nigerian law. Liability in this case cannot be attributed to any defendant unless ETC can prove the tendering and payment of the bribe to the appropriate Nigerian officials or at least, as ETC has suggested, the anticipation of such payment and reliance upon such anticipation by the appropriate Nigerian officials and thus the violation of Nigerian law by these government officials. The same considerations are relevant where the acts of a foreign sovereign are questioned directly or collaterally in litigation between private parties. *See Frazier v. Foreign Bondholders Protective Council*, 283 A.D. 44, 125 N.Y.S.2d 900, 903 (1953) ("immunity of a foreign sovereign, in all its implications, is not restricted to warding off only those assaults aimed directly at that sovereign as a party proper.").

The *Clayco* court followed *Occidental Petroleum Corp. v. Buttes Gas & Oil*, 331 F.Supp. 92 (C.D. Cal.1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). In *Occidental* plaintiff alleged the foreign sovereign issued a fraudulent territorial decree to enable the defendants, in lieu of plaintiff, to export oil and gas in the area covered by the decree. *Occidental Petroleum*, 331 F.Supp. at 95. While noting *Occidental* involved a territorial decree not present in *Clayco*, the Ninth Circuit noted the underlying dispute in both cases concerned the decision by a foreign government authorizing the exploitation of an important natural resource. The Ninth Circuit noted "it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum*, 712 F.2d at 407. Accordingly, it is not unrealistic to anticipate judicial scrutiny of the sovereign decisions of the Republic of Nigeria in allocating and awarding contracts with regard to military bases would, if not embarrass the political branches of our government, tend to make the conduct of our foreign policy with Republic of Nigeria more difficult and would require an exploration of the motive and intent of certain Nigerian governmental officials.

In determining whether to apply the act of state doctrine to this situation, ETC contends the court may inquire as to the

motivation, rather than the validity, of the questioned activities. In support of this proposition, plaintiff cites *Williams v. Curtiss-Wright Corp.*, *supra*, the Third Circuit's most recent decision in this area. The facts in *Curtiss-Wright*, however, are distinguishable and do not preclude application of the doctrine in this case.

The parties in *Curtiss-Wright* were competitors in the sale of used jet engines, parts and accessories to foreign governments. Plaintiff charged defendant with antitrust and other related state law violations. Specifically, plaintiff alleged defendant monopolized the market and engaged in the common law torts of disparagement, unfair competition, and interference with prospective economic advantage, all of which prevented plaintiff from competing in the worldwide market of reconditioned parts for aircraft engines. *Curtiss-Wright*, 694 F.2d at 301. The complaint regarded the foreign governments, not as participants in the wrongdoing against plaintiff, but as co-victims of the alleged antitrust activity of plaintiff corporation. Accordingly, the thrust of plaintiff's challenges were the anti-competitive effects of the Curtiss-Wright activities and not the validity or motivation of the conduct of foreign governments. Resolution of plaintiff's claims did not require inquiry into the motivation of foreign governments. *Id.* at 303-304.

In contrast to the allegations of the complaint in *Curtiss-Wright*, the amended complaint filed by ETC alleges by necessary implication the involvement by high Nigerian Government officials in the corrupt practices and requires the motivation of these government officials, if not the government as an entity, be examined in order for ETC to prevail on its claims. ETC alleges Akindele acted as the local agent in Nigeria for certain of the defendants in order to secure the Nigerian Contract. As a result of Akindele's efforts the Nigerian Contract was negotiated at a rate which was allegedly twenty percent higher than would be expected in order to provide defendants with the capital to pay the commissions/bribes. In substance, the negotiations and consequent award of the Nigerian Contract, as alleged in the amended complaint, were the result of the Nigerian Government or certain Nigerian officials participating fully in the scheme and

agreeing to pay an increased price in order to provide money for the bribes for various Nigerian governmental-political and military-figures.

Although the decision in *Hunt v. Mobil Oil Corp.*, *supra*, concerned claims based upon expropriation, the judicial examination of which is traditionally recognized as barred by the act of state doctrine (such circumstances are not present in ETC's alleged complaint), *Hunt* is nevertheless instructive in the weighing process used to determine whether the act of state doctrine is to be applicable. In *Hunt* it was claimed but for an alleged conspiracy, the business of the plaintiff would have continued to thrive. The Second Circuit agreed with the District Court that such allegations "necessarily would require a wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease Aresident al-Qadhafi." *Hunt*, 550 F.2d at 78.

Similarly, in this case, in addition to proving the bribe was in fact paid to or anticipated by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation of the bribe caused the award of the Nigerian Contract to Kirkpatrick International and whether ETC could have obtained the contract had the bribe not been paid or anticipated. Inquiry into the motivation of the Nigerian government, to the extent anticipated in *Hunt*, appears to be necessary for resolution of this case.[12]

[16] In certain situations, the act of state doctrine has been limited to discretionary, not ministerial acts of a foreign government. For example, in *Mannington Mills* the issue presented to the Third Circuit was the issuance of a patent by a foreign government. This action was regarded by the Third Circuit as ministerial

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[12] In *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F.Supp. 896, 908 n. 24 (E.D.Mich.1981), the court sought to distinguish a "kickback" in a situation which is not relevant to this litigation.

or an insignificant act of the sovereign. The granting of patents *per se* was found not to be within the purview of the act of state doctrine since it is not the type of sovereign activity that would cause substantial concern to the executive or legislative branches of our government.[13] Accordingly, there was no reason to bar the suit because of foreign policy concerns. *Mannington Mills*, 595 F.2d at 1294. In this same vein, the Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) is recognized to stand for a commercial exception to the act of state doctrine. *See* n. 11, *supra*. This exception in essence acknowledges that when a government acts in a commercial mode it is not acting as a sovereign and therefore the doctrine is inapplicable.

[17,18] *Clayco Petroleum* is also significant because the Court distinguished application of FCPA and indicated the FCPA is not an exception to the act of state doctrine. *Clayco Petroleum* indicates FCPA was intended to stop bribery and noted both the Justice Department and the Securities and Exchange Commission share enforcement responsibilities under FCPA. The opinion noted that any governmental enforcement represents a judgment of the Executive Branch on the wisdom of bringing a proceeding in light of the exigencies of foreign affairs. Act of state concerns are thus inapplicable, to the extent of a FCPA prosecution, since the purpose of the doctrine is to prevent the judiciary from interfering with the conduct of foreign affairs. *Calyco Petroleum*, 712 F.2d at 408-409, *citing*, *Sabbatino*, 476 U.S. at 423, 84 S.Ct. at 937-38; *Timberlane*, 549 F.2d at 605. *Clayco Petroleum* also suggests it is the screening of governmental proceedings, with state department consultation, which distinguishes FCPA enforcement from private suits. In private suits, the act of state doctrine remains necessary to protect proper conduct of national foreign policy. *Id.* 712 F.2d at 409.

[19] Significantly, prosecution was had against both Carpenter and Kirkpatrick. The offer of proof executed by Carpenter is

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[13] It is noted *Mannington Mills* did not create an exception to the act of state doctrine based on the ministerial-discretionary dichotomy. *See Curtiss-Wright*, 694 F.2d at 303.

carefully worded and does not establish any bribes were in fact paid to a member of the Nigerian Government although it adequately sets forth the requirements to establish Carpenter intended such action to take place. Thus, a violation of FCPA demonstrated. Likewise, the transcript with regard to the sentencing of Kirkpatrick for the violation of FCPA sets forth the concern of the United States Government and the lack of a disclosure order from the State Department with regard to the allegations of bribery concerning the Nigerian Contract. Read together, these documents indicate a conscious decision on behalf of the Executive Branch through the Department of State for a limited prosecution under FCPA (limited in the amount of disclosure of facts) and the efforts of the Government in resisting attempts by the Nigerian Government in discovering information with regard to what Carpenter knew of the payment of the bribes.[14]

[20,21] In light of the State Department Position, ETC has suggested application of a form of the so-called "Bernstein" exception to the act of state doctrine.[15] The State Department Position

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[14] In addition to all of the allegations in the amended complaint which allege by necessity Nigerian Government involvement, Article XX of the Nigerian Contract provides that "[t]his Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria . . . ." In Article XXI of the Nigerian Contract provides for disputes "to be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria. . . ." To date, the government of the Republic of Nigeria has not taken any steps to repudiate the acts of its governmental officials. This inaction is significant.

It has been noted in two decisions that unreputed acts of a foreign government can be scrutinized if they resulted from corruption of government officials. *Sage Intern*, 534 F.Supp. at 910; *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680, 690 (S.D.N.Y.1979). *Sage* relies upon *Gulf & Western* and *Gulf & Western* cites *Hunt*, 550 F.2d at 79 as authority for this statement. However, *Hunt* specifically states: "This appeal therefore is not the proper vehicle for consideration of international commercial bribery insofar as it affects the act of state doctrine." *Id.*

[15] In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768, 92 S.Ct. 1808, 1813-14, 32 L.Ed.2d 466 (1972) (Brennan, J., dissenting) *reh'd denied*, 409 U.S. 897, 93 S.Ct. 92, 34 L.Ed.2d 155 (1972) a plurality of the Supreme Court adopted the "Bernstein" exception. "[W]here the Executive

(footnote continued)

indicates: "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Additionally, the State Department states that judicial inquiry into "motivations of the Government of Nigeria's decision to award the [Nigerian C]ontract" would not be precluded by the act of state doctrine. The State Department Position, however, goes on to note inquiries into the motivation and validity of actions by foreign states and discovery against foreign government officials may seriously affect United States foreign relations. (Appendix A). As such the State Department fails to clearly "sign off" on the application of the act of state doctrine in this case.

> The State Department opines that:
> inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials *may seriously affect United States foreign relations*. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at *each relevant stage* in the proceedings. Moreover, *the court should endeavor to assure that no unnecessary inquiries* are made, *or allegations* tested during the course of discovery or trial.

(Appendix A, emphasis added). It is significant that in light of this caution, *this court* is urged "to assure that no unnecessary inquiries are made, or allegations, tested during the course of discovery or trial." [18] *Id.*

Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *Id.*

[18] For example, a consideration of this concern of the State Department clearly would have to include the issuance of a subpoena for records in Nigeria. Since such an action may well affect the foreign relations of this country, a court must weigh the interests of this country and Nigeria before issuing such a subpoena. A court must give "deference to the determination by the Executive Branch – the arm of the government charged with primary responsibility for

(footnote continued)

[22] The overview and judgments of this court, as urged by the State Department, may well have a significant impact on the foreign affairs on this country – an area of decision-making the Constitution largely commits to the discretion of the Executive. Before launching investigations on foreign soil, or of foreign nationals, or of matters implicating international diplomacy, the Executive has the option to weigh the implications of such conduct on the overall foreign policy of this country. This obviously will not happen in the scenario suggested by the State Department Position.

[23] Equally important to this court's determination of whether the parties to this matter are making unnecessary inquiries or testing unnecessary theories is whether there is any risk to national security. The Executive Branch must make the decisions as to whether disclosure of facts will have any ramification as well as on diplomatic relations. In this regard, as noted earlier, Carpenter's offer of proof upon which his criminal conviction for violating FCPA is based is carefully and narrowly worded. It cannot be said such careful wording is without intent or significance. See, the Levy Representations.

The significance of the impact of this case on the Government of Nigeria (see the Levy Representations) and on the conduct of this country's foreign policy (see the State Department Position) is obvious. The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy.[17]

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formulating and effectuating foreign policy – that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure." *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (citations omitted). This is not what is suggested by the terms of the State Department Position.

[17] No individual who is responsible for or knowledgeable of this nation's foreign policy or security will be in a position to know of the pretrial and trial decisions and evaluate their impact on foreign policy. Moreover, even if such person were available to the court, counselling the court for or against such decisions would pose serious problems of, at the least, an appearance of impropriety.

(footnote continued)

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat v. United States*, 219 U.S. 346, 355, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911) (citation omitted). The essence of judicial power is the resolution of cases or controversies. *Id.* at 356, 31 S.Ct. at 253. There is a notable absence of Constitutional authority for a court to assume responsibility for the conduct of a segment of foreign policy, which is what the State Department suggests.

Neither Congress nor the Executive may vest in or assign to judges holding office under Article III powers beyond those clearly confined to them by the Constitution. Nor may courts exercise such powers if granted or delegated. *See Buckley v. Valeo*, 424 U.S. 1, 123, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976); *Muskrat*, 219 U.S. at 356, 31 S.Ct. at 253-54; *Ex Parte Siebold*, 100 U.S. (10 Otto) 371, 398, 25 L.Ed. 717 (1879).

There are foreign policy considerations involved in ETC's proving its cause of action. Proof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria with regard to its failure to date to take action against government officials involved and/or other individuals involved. The July 31 letter from counsel to ETC to the Republic of Nigeria requesting a declaration of approval with regard to this civil litigation, even if a Nigerian response is forthcoming, is not dispositive of the issues. Indeed, it is the conduct of foreign policy by the Executive and Legislative Branches of this Government which must be controlling.

[24,25] ETC's amended complaint is aimed at alleged antitrust and RICO violations of defendants which require inquiry into

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Moreover, such a procedure (although not explicitly suggested by the State Department) would bring the basic separation of powers rule into question. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1 Annals of Congress 581, (quoted in *Myers v. United States*, 272 U.S. 52, 116, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926)).

the actions, conduct and motivation of the Republic of Nigeria and its agents. Although "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations[,]" *Curtiss-Wright*, 694 F.2d at 304 (citation omitted), I am satisfied the Moving Defendants have established[18] the actions, conduct and motivation of the Republic of Nigeria and its agents are ". . . basic and fundamental to the alleged antitrust [,RICO and other] behavior and [are] more than merely peripheral to the overall [alleged] illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293. Moreover, the suggestion of the State Department is neither practical nor constitutional. The motion to dismiss because of the act of state doctrine is granted.

E. *Appeals of Magistrate's Orders*

1. *Standard of Review*

[26] Also before the Court are three appeals of orders entered by Magistrate Hedges, two of which are discovery related and the third sustains Carpenter's claim of privilege against self-incrimination which defendant asserted at his deposition. In considering each of the three appeals, the Court must apply the standard of review of a magistrate's order as set forth at 28 U.S.C. § 636(b)(1)(A), Fed.R.Civ.P. 72(a), and Rule 40(A) of the Local Rules of the United States District Court for the District of New Jersey. The Third Circuit has held a magistrate's order can be set aside only if it is found to be clearly erroneous or contrary to law. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1113 (3d Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987).

[27] "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire *record* is left with the definite and firm conviction that a mistake has

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[18] It is the burden of the Moving Defendants to establish the applicability of the act of state doctrine. *Curtiss-Wright*, 694 F.2d at 303 n. 4, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684, 96 S.Ct. 1854, 1856, 48 L.Ed.2d 301 (1976).

been committed." *Agricultural Services Assn., Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1071 (6th Cir.1977) *quoting United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541-42, 92 L.Ed. 746 (1948). Several courts have also held that a magistrate's order in a discovery dispute is subject to great deference and will only be reversed if found to be an abuse of discretion. *See Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D.N.Y.1982); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 95 F.R.D. 398, 399 (S.D.N.Y.1982), *aff'd* 814 F.2d 90 (2d Cir.1987).

2. *Appeal from the May 30, 1986 Order*

ETC appeals from an order entered by Magistrate Hedges on May 30, 1986 [*], which stayed plaintiff's discovery pending disposition of the motions to dismiss.

[28,29] The court converted the defendants' motion to dismiss into a summary judgment motion only on the limited question of the applicability of the act of state doctrine because of the additional submissions. In response, ETC filed the instant appeal on the incorrect assumption that additional discovery on the act of state is necessitated. Accordingly, ETC appeals on the ground that the magistrate's order is "an abuse of discretion and contrary to law" (ETC's Notice of Appeal) because ETC is deprived of conducting discovery which may produce facts relevant to the act of state issue. However, applicability of the act of state doctrine (*see* Section D) is purely a legal question, the resolution of which requires no further factual development. Furthermore, additional discovery is inconsistent with the conclusions regarding the act of state doctrine. The taking of discovery by ETC would necessarily involve inquiry into the action of the Nigerian Government and its officials.

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[*] This appeal was not filed within the time limit prescribed by Local Rule 40(D)(4)(a), however, due to the somewhat confusing circumstances surrounding these motions, it shall be considered. The Affidavit of Alan A. Turner dated September 10, 1986, and the Memorandum of Law in Support of the Notice of Appeal submitted in connection with this motion detail the facts regarding these circumstances.

Applying the limited standard of review mentioned previously, ETC has not demonstrated the magistrate's order is clearly erroneous or contrary to law. Only after the court posed questions to counsel regarding the act of state question did ETC seek further discovery which was unnecessary for the motion. At the present juncture, additional discovery is contrary to the application of the act of state doctrine. Accordingly, the magistrate's order is affirmed.

3. *Appeal of the July 16, 1986 Order*

[30] During his June 30, 1986 deposition Carpenter asserted his privilege against self-incrimination and refused to answer certain questions. Magistrate Hedges sustained Carpenter's claim of privilege in a Letter-Order and Opinion, dated July 16, 1986. This appeal followed.[20]

Prior to his deposition, Carpenter submitted an affidavit (the "Carpenter Aff.") setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual bases for assertion of the privilege. As discussed earlier in this opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media coverage and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. (Carpenter Aff., ¶2) Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian Contract. (*Id.* at § 3) Akindele further warned Carpenter not to travel to Nigeria and to exercise extreme care in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. (*Id.* at ¶ 4)

In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted

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[20] Disposition of the appeal was postponed until oral argument and decision on the motion to dismiss.

to get [Carpenter] to Nigeria." (*Id.* at ¶5) This information, which originally came from Interpol, was relayed to Carpenter. (*Id.* at ¶ 5) Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated." (*Id.* at ¶ 6)

In sustaining Carpenter's Fifth Amendment privilege, Magistrate Hedges applied the guidelines set forth in *United States v. Flanagan*, 691 F.2d 116 (2d Cir.1982). In *Flanagan*, defendant was subpoenaed to appear before a federal grand jury which was investigating an alleged gun-smuggling conspiracy in operation for the benefit of the Irish Republican Army in Ireland. After his intent to invoke the Fifth Amendment was known, defendant Flanagan was granted immunity from the use of his testimony against him in any subsequent criminal proceeding. *Id.* at 119.

Flanagan's motion to quash the subpoena was based in part on the argument that because the grant of immunity would not protect him from prosecution in foreign countries, a protection coexistive with the Fifth Amendment privilege. Although the Second circuit found "Flanagan's fear of foreign prosecution, viewed objectively, [to be] remote and speculative rather than real, reasonable, or substantial" *id.* at 122, the court's discussion of factors to be considered in making such a ruling is helpful.

Among the factors detained in *Flanagan* are the "reality or remoteness of the risks of incrimination under foreign law" *id.*, the existence of foreign laws authorizing prosecution of the criminal acts in question, whether the testimony may enable the foreign government to seek extradition, and whether the testimony is likely to be disclosed. *Id.* at 120-23. In his decision, Magistrate Hedges considered these factors as applied to Carpenter and concluded the privilege should be upheld.

On appeal, ETC contends the protection afforded by the Fifth Amendment is not available to Carpenter because he has already pled guilty to a violation of the Foreign Corrupt Practices Act. Furthermore, ETC disputes the existence of a real threat of prosecution. Alternatively, ETC suggests the testimony should be taken under a protective order.

The Fifth Amendment guarantees every person freedom from self-incrimination and protects a witness against providing testimony "leading to the inflictions of penalties affixed to . . . criminal acts." *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972) *reh'g denied*, 408 U.S. 931, 92 S.Ct. 2478, 33 L.Ed.2d 345 (1972) (citations omitted). The protection is available where the testimony "would furnish a link in the chain of evidence needed to prosecute" the witness for a crime, provided "the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). Consideration of ETC's arguments necessitate a review of the standard for invoking claims of the Fifth Amendment privilege.

The extent to which the Fifth Amendment privilege may properly be asserted on the grounds of potential prosecution in foreign countries is unclear. *United States v. Kowalchuk*, No. 77-118, slip op. (E.D.Pa. Oct. 20, 1978).[2] There is, however, agreement that the Fifth Amendment only protects against real and substantial threats of incrimination, not speculative or theoretical possibilities. *Zicaredi v. New Jersey Investigation Commission*, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972). In assessing the severity of threat, one court has found there to be a

> common theme to all of the reported cases in that questions relating directly to criminal activities in foreign countries pose a more serious threat of incrimination than do questions about events and activities within this country having only direct and remote connection to foreign culpability.

Kowalchuk, slip op. at 4, citing *In re Parker*, 411 F.2d 1067 (10th Cir.1969), *vacated as moot*, *Parker v. United States*, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed.2d 81 (1970); *In re Cardassi*, 351 F.Supp. 1080 (D.Conn.1972).

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[2] This unreported decision was included in Carpenter's opposition to the appeal and was therefore available to all counsel.

ETC contends the Fifth Amendment protection is not available to Carpenter in light of Carpenter's previous plea of guilty to violation of the FCPA. This argument is not persuasive for two reasons. First, there would be no need to depose Carpenter if the information sought had been disclosed in connection with Carpenter's earlier prosecution. It is logical then to assume the requested information goes beyond the investigation under the FCPA. Therefore, Carpenter may invoke the Fifth Amendment to avoid further incrimination. Second, case law supports protection of Carpenter's testimony because prior disclosure is not held to be a waiver of the privilege. *United States v. Yurnasovich*, 580 F.2d 1212, 1218-1220 (3d Cir.1978).

> The initial statement is incriminating, a subsequent statement on the same subject would necessarily be further incriminating because the second statement would corroborate the earlier statement, making it more difficult for the witness to discount the earlier statement and hence increasing the danger of conviction.

Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45, 49 (S.D.N.Y.1982) *quoting E.F. Hutton & Co. v. Jupiter Development Corp.*, 91 F.R.D. 110, 115 (S.D.N.Y.1981).

[31] ETC also challenges Carpenter's assertion of the Fifth Amendment on the ground that Carpenter's fear of foreign prosecution is not founded. This argument ignores certain relevant facts. As previously detailed, Carpenter has been informed on more than on occasion of the danger he faces by travelling in Europe or Africa (Carpenter Aff. at ¶ 4) and of Nigerian official's desire to prosecute him. (*Id.* at ¶ 3) These facts are not properly ignored because determinations as to whether the privilege is justified are to be made by the trial court based on the particular circumstance of each case. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951).

[32] Furthermore, contrary to ETC's contentions, a pending foreign prosecution is not a prerequisite to Fifth Amendment protection. *See Kawalchuk*, slip op. at 8 ("[t]he actual pendency of

criminal proceedings is not a prerequisite to the successful invocation of the Fifth Amendment privilege."), *In re Cardassi*, 351 F.Supp. at 1085 (interpreting *Zicarelli*, not to require any indication that a foreign prosecution is "imminent.").

The magistrate's decision to uphold Carpenter's Fifth Amendment claim has not been shown to be clearly erroneous or contrary to law. Based on the magistrate's thorough discussion and this court's independent analysis of the relevant facts and applicable case law, the magistrate's decision shall be affirmed.

4. *Appeal of the January 20, 1978 Order*

As part of discovery, ETC issued a deposition notice and subpoena *duces tecum* to Steven Levy, an attorney with the Department of Justice. ETC sought Mr. Levy's deposition and production of materials obtained by Mr. Levy in connection with an ongoing grand jury investigation. The United States of America ("the Government") moved to quash the subpoena pursuant to Rule 26(c) Fed.R.Civ.P.

On January 20, 1987, Magistrate Hedges granted in part and denied in part the Government's motion to quash, and ETC appealed. At oral argument it was determined the issues on appeal had been rendered moot because the subpoena was withdrawn. (3/6/87 Tr. 61:6-13)

Conclusion

Because ETC's amended complaint alleges facts sufficient, for the purposes of these motions to dismiss the pleading, to establish a relationship among Holding, IDC, Carpenter and Kirkpatrick to support the potential imposition of liability upon Holding and IDC for wrongful actions of Carpenter and Kirkpatrick, the motion to dismiss Holding and IDC as defendants is denied.

Because ETC's amended complaint alleges that ETC failed to procure the Nigerian Contract because of the alleged antitrust and RICO violations committed by defendants, the motion to dismiss those claims for lack of standing is denied.

Because ETC has failed to allege in its pleadings facts establishing a pattern of racketeering activity as required under RICO and the New Jersey Anti-Racketeering statutes, the motion to dismiss ETC's anti-racketeering claims is granted.

Because of the act of state doctrine, the motion to dismiss ETC's complaint against the defendants is granted.

The parties have agreed to dismiss without prejudice counts five and six of the complaint.[22] Accordingly, counts one, two, three, four and seven are hereby dismissed with prejudice; counts five and six are dismissed without prejudice pursuant to agreement of counsel.

APPENDIX A

United States Department of State

The Legal Adviser

Washington, D.C. 20520

December 10, 1986

The Honorable
Alfred L. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

Re: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., et al.*,
Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views

[22] See letter of March 16, 1987 from counsel on behalf of Emro and Ruppert to counsel for plaintiff.

of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions . . . None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment*

Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48 (5th Cir.1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd. v. Cadillac Gage Co.*, 534 F.Supp. 896, 908 (E.D.Mich.1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F.Supp. 3 (D.D.C.1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

/s/ Abraham D. Sofaer
Abraham D. Sofaer

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.,
IDC INTERNATIONAL
S.A. LUXEMBOURG,
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC.,
ROSS E. SAXON c/o NAUTILUS
ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.,

Appellants in No. 87-5546

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Present: GREENBERG and SCRICIA, *Circuit Judges* and POLLAK,
*District Judge**

*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 20, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 5, 1987, be, and the same is hereby reversed insofar as the said District Court's act of state decision, the dismissal of the RICO and Anti-Racketeering Act claims and the affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. It is further ordered and adjudged that the said judgment is affirmed as to the other issues, and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Clerk

May 2, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5328 and 87-5546

Environmental Tectonics, Appellant in No. 87-5328

vs.

W. S. Kirkpatrick Inc., etc.

W. S. Kirkpatrick & Co., Inc., W. S. Kirkpatrick & Co., International and D.I.C. (Holding) Inc.,
Appellants in No. 87-5546

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 22, 1988.

Circuit Judge

Dated: May 26, 1988